



A Handbook on the Legal Obligations and Rights of Public and Assisted Housing Providers Under Federal and State Fair Housing Law for Applicants and Tenants with Disabilities

Originally produced under the Department of Housing and Urban Development's Fair Housing Initiatives Program (FHIP)

Massachusetts, July 2015

Written and revised by:
Debbie Piltch, M.E., M.S., J.D., Piltch Associates

in consultation with
Ann Anderson, M.M.H.S., ADA and Housing Services, Inc. (retired)

ACKNOWLEDGMENT AND DISCLAIMER

The work that provided the basis for this publication was supported by funding under a grant with the U.S. Department of Housing and Urban Development. The substance and findings of the work are dedicated to the public. The authors and publisher are solely responsible for the accuracy of the statements and interpretations contained in this publication. Such interpretations do not necessarily reflect the views of the Government.

Piltch Associates, Inc., ADA Housing and Services, and MassHousing produced this handbook by gathering information from various documents and individuals. Due to the potential for errors, omissions, or inaccuracies, which may exist in the materials and information provided, there is some risk associated with reliance on such information. Contact an attorney regarding any legal matter related to the information contained in this handbook involving an applicant for housing or tenant.

About MassHousing:

MassHousing (the Massachusetts Housing Finance Agency) is an independent, quasi-public agency created in 1966 and charged with providing financing for affordable housing in Massachusetts. The Agency raises capital by selling bonds and lends the proceeds to low- and moderate-income homebuyers and homeowners, and to developers who build or preserve affordable and/or mixed-income rental housing. MassHousing does not use taxpayer dollars to sustain its operations, although it administers some publicly funded programs on behalf of the Commonwealth. Since its inception, MassHousing has provided more than \$19 billion for affordable housing. MassHousing is recognized as one of the premier housing finance agencies in the country, and has won numerous national awards for creativity and innovation in affordable housing. For more information, visit the MassHousing Web site at www.masshousing.com.

About the Authors:

Debbie Piltch is an attorney with considerable expertise in discrimination law and housing law. She worked for more than five years at the Disability Law Center (DLC) in Boston, representing low-income individuals in cases involving

discrimination in housing, employment and education. She also designed and conducted training for consumers and public and private entities on disability discrimination law. While at DLC, she served on the HUD Occupancy Task Force and wrote the section of its report dealing with drug and alcohol addiction.

She left DLC in 1994 to establish a consulting business that provides technical assistance and training to government and private entities on their rights and responsibilities in relation to civil rights and housing laws. She has developed a national reputation in the field of housing and discrimination law and has been fortunate to work with a number of the leading government and private organizations involved in housing issues. A significant portion of her work for these organizations has focused on designing, developing and implementing training programs on occupancy issues, tax credit compliance and fair housing. She has co-written several Reasonable Accommodation handbooks with MassHousing and has done training and consulting around the country for HUD, the National Affordable Housing Management Association (NAHMA) and various housing authorities and housing management companies. In addition, in her capacity as a consultant, she has analyzed countless organizations' rules, policies and procedures in an effort to insure that they are in compliance with applicable civil rights and housing laws. She has also designed compliance protocols for government and private entities and has served as an independent monitor for the MA Attorney General's office in a discrimination case. Although she continues to maintain her consulting business, she is presently employed as the director of compliance for Maloney Properties, a private housing management company with units of affordable housing in Massachusetts, Vermont, New Hampshire, and Rhode Island.

Ann Anderson, who has retired since the last publication, was principal of ADA Housing and Services. She worked as a trainer and consultant for management, supportive services and disability issues. In this capacity, she developed and conducted fair housing and related training for New England Affordable Housing Management Association (NEAHMA), housing authorities, state service agencies, Massachusetts Housing Courts, and housing management companies. Ann served as the Director of Community Services at MassHousing where she worked for over 14 years, with a concentration on disability issues in housing. She conducted training programs in Reasonable Accommodations in seventeen

states under the auspices of HUD Fair Housing Initiatives Program grants, and co-authored several handbooks on the subject that are available nationally. Ann served as Co-Chair of the Occupancy Sub-Committee of the HUD Occupancy Task Force. Prior to her work at MassHousing, Ann worked for ten years in a variety of community-based mental health programs. Ann is a graduate of Oberlin College and holds a Masters in Management of Human Services from the Heller School of Brandeis University.

PREFACE TO THE EIGHTH REVISION

This Handbook was originally written and produced with a grant in 1992 to the Massachusetts Housing Finance Agency, now known as MassHousing, and the Disability Law Center (DLC) from the United States Department of Housing and Urban Development (HUD) under the Fair Housing Initiative Program (FHIP). The Massachusetts Department of Housing and Community Development assisted substantially in reviewing the original Handbook and organizing the training in how to use it, as did the Massachusetts Departments of Mental Health and Public Health, the Developmental Disabilities Council, and the Massachusetts Rehabilitation Commission. The final decisions about content were made by MassHousing and DLC. MassHousing received HUD FHIP grants in 1994 and 1996 to update the Handbook. MassHousing has financed subsequent editions.

The second and third chapters rely very heavily on William Crane's practice memorandum on the rights of persons with disabilities regarding housing in Massachusetts which was rewritten and incorporated into the Disability Law Center's publication titled "Discrimination on the Basis of Disability: Federal and Massachusetts Laws." These chapters also used other information contained in that publication, which was primarily written by Jane Alper and Debbie Piltch, formerly of DLC, and edited by Jane Alper (retired), in conjunction with the Pike Institute of Boston University School of Law.

We also wish to thank a number of people who reviewed this document at various stages: Jane Alper, Barbara Chandler, Greg Russ, Henry Korman, Mac Macreight, Valda Winsloe, and Lisa Sloane. Special thanks go to Michelle Prunier.

To obtain a large print, tape, or electronic version of this Handbook, contact MassHousing at TEL: 617.854.1077, VP: 866.758.1435, FAX: 617.722.0605 or www.masshousing.com/fairhousing.

INTRODUCTION

This Handbook is for public and assisted-housing providers. It explains your legal obligations and rights under federal and state fair housing law for applicants and tenants with disabilities.^a The Handbook explains the various federal and state laws relating to disability discrimination and shows what these laws require and allow housing providers to do throughout the occupancy cycle (admissions, occupancy, and eviction). If you are a housing provider, you need to know how these laws affect your day-to-day practices regarding tenants. We have focused on applicants and tenants who have a psychiatric disability or a history of a psychiatric disability, other mental disabilities, alcoholism or a history of alcoholism, HIV/AIDS, or have a history of illegal drug use, but the laws and principles apply to people with all types of disabilities

We have tried to present information in non-technical language where possible. The first chapter of this Handbook answers the questions most commonly asked by public and assisted-housing providers. You will see that some questions have very clear answers. For other questions, there are several opinions about what is the correct answer. That is because sometimes the law is so new or general that lawyers have different opinions about what it really means. The final answers will be determined over time as various regulatory agencies and courts make decisions on situations where the parties disagree. In the meantime, you and your lawyer need to consider the issues carefully and make what you think is the most reasonable decision.

The second chapter provides a basic overview of what constitutes the “law” for those unfamiliar with legal processes and terms and explains what happens if more than one law applies to a particular situation. We then discuss the applicable federal laws and include a chart describing who has a disability for the purpose of each law, what housing practices are prohibited and allowed, and what housing providers are supposed to do. This chapter covers Section 504 of the Rehabilitation Act,^b Titles II and III of the Americans with Disabilities Act,^c and the Fair Housing Act^d because they are the federal laws that set out your legal obligations and rights.

Chapter Three provides an analysis of the principal state laws in Massachusetts. We recommend that providers gather a list of relevant service providers from whom they and the residents can obtain assistance.

The appendix contains sample forms, an analysis of how to determine undue financial and administrative burdens, and a letter from HUD to MassHousing regarding notice of the right to a reasonable accommodation.

This handbook does not address how fair housing laws impact service-program housing, that is, housing where admission is based on the need and desire for services as a package with housing. Nor does this Handbook focus on physical access requirements contained in federal and state laws. There are numerous resources available on this topic.

Please note that this handbook uses the term “handicap” as well as “disability” because earlier federal laws prohibiting discrimination against persons with disabilities, §504 of the Rehabilitation Act and the Fair Housing Amendments Act, use or historically used this term. The most recent federal law, The Americans with Disabilities Act, uses the term “disability.” The terms mean the same thing, but the later law uses “disability” because many people with disabilities prefer this term.^e Also, the term reasonable accommodation isn’t consistently used in all of the laws discussed in this Handbook. The Fair Housing Act uses this term to refer to changes in rules, policies, procedures, and services and doesn’t include physical changes to a unit or common area. Title II of the ADA uses the term reasonable modification to describe a public entity’s obligation to make changes in policies, practices or procedures when necessary to avoid discrimination on the basis of disability. In contrast, under Section 504, structural changes needed by an applicant or resident with a disability in housing receiving federal financial assistance are considered reasonable accommodations. Throughout this handbook our use of the term reasonable accommodation includes changes in rules, policies, procedures, services and physical modifications unless otherwise noted.^f

TABLE OF CONTENTS

CHAPTER 1:

QUESTIONS COMMONLY ASKED BY HOUSING PROVIDERS

I. APPLICATION PROCESS	1
A. WHAT A HOUSING PROVIDER MAY AND MAY NOT ASK AN APPLICANT.....	2
1. What may I ask and what must I ask an applicant for housing?.....	2
2. May I ask an applicant if she has a disability?.....	6
3. If a person is applying for housing that is designated for individuals with disabilities, or individuals with a particular disability, or a unit with a special feature, what may I ask an applicant about her disability?.....	8
4. What may I ask an applicant about her disability if she asks for a reasonable accommodation?.....	10
5. If a person discloses a disability must I keep the information confidential?.....	10
6. For their own safety may I restrict people with mobility impairments to the first floor or to accessible units?.....	11
7. What responsibilities does an owner/manager have for residents with disabilities in case of a fire or other emergency evacuation?.....	11
8. May I ask an applicant if she spent time in a treatment facility or hospital or if she is presently in treatment?.....	12
9. If I manage federally funded public or assisted housing or a Section 8 voucher program, what must I do to screen applicants in regard to illegal use of a controlled substance and use or abuse of alcohol?.....	12
10. May I ask an applicant if she currently illegally uses drugs?.....	13
11. May I ask an applicant about past illegal drug use within a specified period of time?.....	14
12. May I ask an applicant if she drinks alcohol, how much she drinks, or	

how often she drinks?.....	15
13. May I ask an applicant if she has a history of alcohol abuse or illegal drug use?.....	16
14. May I require all applicants to sign a consent form for obtaining information from a drug abuse treatment program?.....	17
15. May I ask an applicant if she has a criminal record?.....	17
16. If someone has a history of alcohol abuse, but there is no bad tenancy history or criminal record, may I ask the person to verify that she is not currently abusing alcohol and/or is engaged in treatment?.....	20
17. If an applicant with a psychiatric disability or a history of psychiatric disability does not have a bad tenancy record, may I ask her to verify that her disability will not affect her capacity to be a good tenant?.....	20
18. If someone with a history of illegal drug use has no bad tenancy history or criminal record, may I ask the person to verify that she is not currently using illegal drugs?.....	20
 B. BAD TENANCY HISTORY OR CRIMINAL RECORD.....	22
1. May I reject an applicant with a bad tenancy history or criminal record?.....	22
2. How do I know if a person's poor housing history is a result of a disability?.....	24
3. What should I do if the person's bad tenancy history or criminal record is a result of her disability?.....	25
a. Examples of situations that warrant admitting an applicant with a bad tenancy history or criminal record as a result of her disability.....	26
b. Verifying an applicant's assertions regarding her bad tenancy history.....	27
c. Type of Verification.....	28
d. Procedures for Verification.....	28
e. Verification Relating to Illegal Drug Use, Alcoholism and Psychiatric Disability.....	29
f. Methods of Documenting Rehabilitation from Illegal Drug Use and	

That the Applicant Will Be Able to Comply with the Lease.....	30
g. Methods by Which an Applicant Could Document Lease-violating Behavior Related to Alcoholism.....	31
h. Methods an Applicant Can Document That Lease Violating Behavior Related to a Psychiatric Disability Has Changed.....	32
4. If an applicant says her bad tenancy history was because of her disability and that her condition is under control because she is now taking medication, how do I ensure that the applicant continues to take her medication?.....	33
5. May I require a lease addendum requiring a resident to accept services or attend support group meetings, such as alcoholics anonymous (AA)?.....	33
6. If an applicant tells me certain problems will not happen again because she is in a drug recovery program, does it matter how long she has been in recovery?.....	34
7. What type of criminal history may I consider in determining whether to deny someone housing?.....	35
8. How far back in someone's criminal history should I consider?.....	36
9. How can I determine if an applicant's history of criminal behavior is a result of her disability?.....	36
10. Are there some past crimes resulting from a person's disability that are so serious that I can deny someone with a disability housing without considering mitigating circumstances?.....	37
C. REASONABLE ACCOMMODATION.....	38
1. What does my legal obligation to provide reasonable accommodation require me to do in the screening process?.....	38
a. Physical access.....	38
b. Meetings with an applicant.....	38
c. Auxiliary aids and facilitating adequate communication	39
d. Mitigating circumstances.....	40

e. Meeting with the applicant before rejection.....	40
2. When PHAs administer the Section 8 Housing Choice Voucher Program, what type of reasonable accommodations must they provide to applicants and participants with disabilities?.....	41
3. When is it appropriate for a service coordinator to be involved in an application process?.....	42
4. If an applicant requests the same reasonable accommodation that failed to resolve lease problems in a past tenancy, must I provide it?.....	42
5. If a person seems to need a reasonable accommodation but does not ask for one, what must I do?.....	43
6. If an applicant requests an accommodation, may I require documentation that she has a disability and that she actually needs the accommodation?.....	44
7. May I require an applicant to accept a reasonable accommodation?.....	44
8. If an applicant with a psychiatric disability requests a dog in spite of a no pets policy, must I allow it?.....	44
 D. HOMELESSNESS, TIME IN INSTITUTIONS, OTHER NON-TRADITIONAL HOUSING.....	45
1. Can I deny an applicant housing if she has been homeless or in an institution?.....	45
2. If an applicant has not had a landlord for a long time because she has been homeless or in an institution or living with her family, how can she show that she will be a good tenant?.....	46
a. Paying rent and other charges in a timely manner:.....	46
b. Caring for and avoiding damaging the apartment:.....	46
c. Respecting the rights of others:.....	47
d. Avoiding criminal activity:.....	47
e. Complying with other program requirements:.....	47
3. How do I get evidence regarding tenancy for someone who has recently been in prison?.....	48
4. Must an applicant in order to document past living situations, disclose	

that she lived at a hospital or other therapeutic setting which thus discloses information about a disability?.....	48
E. PERSONAL CARE ATTENDANTS.....	49
1. Must I allow a person to have a personal care attendant (PCA) live with her?.....	49
2. Is a single person who requires a live-in personal care attendant entitled to a two-bedroom unit?.....	50
3. Do I have the right to choose an applicant or tenant's PCA?.....	51
4. May I screen a tenant's or applicant's PCA?.....	50
a. Live-In PCAs.....	50
b. Live-Out PCAs.....	51
5. May I check the criminal record of an applicant's or tenant's PCA or prospective PCA?.....	51
6. Is a tenant responsible for her PCA's behavior in the building?	52
II. OCCUPANCY.....	53
A. BEHAVIOR THAT DOES AND DOES NOT VIOLATE THE LEASE.....	53
1. What should I do if a tenant who has not violated the lease appears to be acting out of the ordinary for her?.....	53
2. What should I do if a tenant's disability-related behavior does not violate the lease but is annoying to some residents?.....	53
3. What can I do if a tenant with a disability engages in a minor lease violation?.....	54
a. Speak with the Tenant.....	55
b. Send a Lease Violation Notice.....	55
c. Speak with the Tenant's Service Provider If You Have Permission.....	56
d. Reasonable Accommodation for a Minor Lease Violation.....	57

4. What can I do if a tenant with a disability engages in a major lease violation?.....	57
B. REASONABLE ACCOMMODATION.....	58
1. If a tenant did not disclose a disability when she applied for housing, can she ask for a reasonable accommodation later?.....	58
2. If a tenant asks for a reasonable accommodation only after a dog or cat is discovered, must I allow it?.....	58
3. What may I ask an applicant about her disability if she asks for a reasonable accommodation?.....	59
4. If a tenant requests an accommodation, may I require documentation that she has a disability and that she needs the accommodation?.....	59
5. How many accommodations must I provide a tenant?.....	59
6. May I require a tenant to accept a reasonable accommodation?.....	60
7. What happens when a tenant refuses services but is experiencing problems jeopardizing the tenancy?.....	60
8. Do I have to allow anyone who brings a doctor's letter or a professional's letter to have a companion animal?.....	60
9. Must I allow visitors with service animals or companion animals to bring them onto the premises and into the building?.....	61
10. How do I deal with tenants who request the same treatment that they see me give someone else as a reasonable accommodation?.....	61
11. What is a reasonable accommodation for someone with a psychiatric disability or substance abuse problem who relapses and causes someone bodily harm?.....	62
12. If a person is hospitalized for a period of time, what type of reasonable accommodation may need to be made?.....	62
13. What should I do with the person's possessions if I evict her while she is in the hospital?.....	63
14. Under what conditions may I reject a reasonable accommodation request?.....	64

15. What should I do if I cannot afford to provide the same reasonable accommodation for subsequent tenants who may request it?.....	65
C. INTER-TENANT ISSUES.....	66
1. How should I handle inter-tenant disputes if the situation involves a tenant harassing a tenant with a disability because she has a disability?.....	66
2. What should I do when a tenant with a disability harasses another tenant?.....	67
3. What if a tenant's requested accommodation interferes with other tenants' health, well-being, or quiet enjoyment?.....	68
4. What should I do if a tenant's irrational fears about living with people with certain disabilities causes her actual mental or physical symptoms, such as high blood pressure?.....	69
III. EVICTIONS.....	70
1. What is a lease violation and what is not?.....	70
2. What if the tenant discloses that she has a disability and requests reasonable accommodation during eviction proceedings?.....	70
3. If I know that a tenant's disability relates to the lease-violating behavior, is it legal to initiate a discussion of a reasonable accommodation?.....	71
4. If I have already made reasonable accommodation and the tenant continues the lease-violating behavior, can I move to evict her?.....	72
5. What if the tenant believes that I made the wrong or insufficient accommodation?.....	73
6. What do I do if the tenant is engaging in lease violations but she refuses to discuss the problem or possible solutions?.....	74
7. If I take no further action after a 14-DAY OR 30-day notice because a tenant agrees to services addressing the lease violation, what should I	

do if the tenant starts having lease problems again?.....	76
8. If I take no further action after a 14-day or 30-day notice because a tenant agrees to services addressing the lease violation, what should I do if the tenant stops the service plan, but does not violate the lease?.....	76
9. If a tenant was admitted because she had a service plan to address prior bad tenancy related behavior and she stops services after she has been admitted, may I evict her?.....	77
10. If a tenant violates the lease, may I contact a service provider?.....	77
11. Should I refer a tenant to legal services if I start an eviction?.....	77
12. What can I do to ensure the well-being of other tenants if a tenant's behavior continues to affect other tenants while she is being evicted?.....	77

CHAPTER 2	
FEDERAL DISABILITY DISCRIMINATION LAWS.....	79
A. WHAT MAKES UP THE LAW?.....	79
1. Statutes.....	79
2. Regulations.....	79
3. Executive Orders.....	80
4. Constitutions.....	80
5. Directive Systems.....	80
6. Case Law.....	81
B. WHAT HAPPENS IF MORE THAN ONE LAW APPLIES?.....	82
C. HOW IS THE LAW ENFORCED BY AN INDIVIDUAL?.....	83
D. WHAT FEDERAL LAWS REQUIRE FAIR HOUSING FOR INDIVIDUALS WITH DISABILITIES?.....	84
1. Architectural Barriers Act (ABA) of 1968	85

2. Section 504 of the Rehabilitation Act of 1973:.....	85
3. The Fair Housing Act.....	87
4. Title II of the Americans with Disabilities Act (ADA).....	87
5. Title III of the Americans with Disabilities Act (ADA).....	88
CHART: Federal Laws Prohibiting Discrimination in Housing Against People With Disabilities.....	90
E. HOUSING COVERED AND EXEMPTED UNDER FEDERAL LAW.....	92
F. INDIVIDUALS COVERED BY FEDERAL LAWS.....	92
1. Individuals Who Currently Use Illegal Drugs	93
2. Individuals Who Have a History of Illegal Drug Use.....	93
CHART: Individual with Handicaps/Disabilities.....	96
3. Individuals with Alcoholism.....	97
4. Individuals with Psychiatric Disability.....	97
5. Individuals with HIV or AIDS.....	97
6. Individuals with Other Disabilities.....	98
G. EXCLUSIONS UNDER FEDERAL LAW.....	98
1. Direct Threat to Others.....	98
2. Substantial Physical Damage to Premises.....	99
3. Otherwise Qualified.....	100
H. FEDERAL DISABILITY DISCRIMINATION STATUTES: PROHIBITED AND REQUIRED PRACTICES.....	100
CHART: Prohibitions against discrimination.....	102
1. Examples of discriminatory practices prohibited by federal law.....	103
2. Practices that have the effect of excluding people with disabilities may be illegal.....	105
I. HOUSING PROVIDERS ARE REQUIRED TO MAKE ADJUSTMENTS FOR PEOPLE WITH DISABILITIES TO ENABLE THEM TO HAVE AN EQUAL OPPORTUNITY TO ENJOY HOUSING.....	106
1. Rules, policies, and procedures.....	107
2. Examples of reasonable modifications of rules, policies, and procedures.....	107
3. Fundamental alteration of the housing program.....	108
4. Examples of fundamental alterations of housing programs (changes that would not be required).....	108

5. Physical modifications of premises.....	109
6. Examples of Physical modifications.....	109
7. Factors to consider in determining if a physical modification would pose an undue administrative and financial burden.....	110
8. Reasonable accommodation request procedures.....	110
9. The obligation to provide auxiliary aids.....	111
10. The obligation to assist Section 8 voucher holders with disabilities in finding an accessible apartment.....	112
J. ARCHITECTURAL ACCESSIBILITY.....	112
K. SELF-EVALUATION, NEEDS ASSESSMENTS, TRANSITION PLANS, AND PROGRAM ACCESSIBILITY.....	113
1. Self-evaluation under 504.....	113
2. Needs assessment.....	114
CHART: Self-evaluation (504)	115
3. Transition plan under 504.....	116
CHART: The Transition Plan	116
4. Program accessibility requirements – ADA.....	117
L. ENFORCEMENT OF FEDERAL LAWS.....	117
1. Enforcement mechanisms and remedies available under federal handicap discrimination statutes.....	118
CHART: Federal enforcement mechanisms and possible Remedies	118
M. SECTION 504.....	119
1. Internal grievance procedures.....	119
2. A 504 complaint with HUD.....	119
CHART: Complaint resolution process	121
a. Remedies.....	122
3. Filing a lawsuit.....	122
a. Remedies.....	123
N. FAIR HOUSING AMENDMENTS ACT, AS AMENDED IN 1988 (FHAA).....	123
1. Filing a FHAA complaint with HUD.....	123
a. Referral of complaint to state or local agency.....	123
CHART: the HUD Administrative Complaint Process (for FHAA)	124
b. Investigation of the complaint.....	125

c. Conciliation.....	125
d. Prompt judicial action.....	125
e. Charging the respondent (housing provider).....	125
f. Election of judicial determination.....	126
g. Administrative law judge hearing.....	126
h. Relief.....	126
i. Review.....	126
j. Enforcement.....	127
O. TITLE II OF THE ADA.....	127

**CHAPTER 3
MASSACHUSETTS DISABILITY DISCRIMINATION
LAWS..... 129**

CHART: State laws prohibiting discrimination in housing against people with disabilities.....	130
A. CHAPTER 151B, COMMONLY REFERRED TO AS THE MASSACHUSETTS' HOUSING BILL OF RIGHTS ACT FOR PEOPLE WITH DISABILITIES:	132
1. Housing covered.....	132
2. Individuals protected by the laws.....	132
3. Differences in state law.....	132
4. Reasonable accommodation.....	133
B. AMENDMENT ARTICLE 114 OF THE MASSACHUSETTS CONSTITUTION.....	134
C. THE MASSACHUSETTS EQUAL RIGHTS LAW (M.G.L. C.93 03).....	134
D. MASSACHUSETTS EXECUTIVE ORDER 246.....	135
E. THE MASSACHUSETTS ARCHITECTURAL ACCESS LAW..	135
F. ENFORCEMENT AND REMEDIES UNDER MASSACHUSETTS DISABILITY DISCRIMINATION LAWS...	136
CHART: State Enforcement Mechanisms and Possible Remedies.....	137
1. Chapter 151B – Massachusetts Housing Bill of Rights.....	138

2. Filing with the MCAD.....	138
a. The investigation.....	138
CHART: Chapter 151B Enforcement	139
b. Conciliation Agreement.....	140
c. Hearing.....	140
d. Enforcement in Court.....	141
e. Remedies.....	141
G. MASSACHUSETTS CONSTITUTIONAL AMENDMENT ARTICLE 114 IN CONJUNCTION WITH THE MASSACHUSETTS EQUAL RIGHTS ACT.....	141
H. THE MASSACHUSETTS ARCHITECTURAL ACCESS LAW.....	142
ENDNOTES	143
APPENDIX	215
1. Sample Reasonable Accommodation Policy.....	217
2. Sample Forms.....	225
3. Reasonable Accommodation Requests: Determining Undue Financial and Administrative Burden and Fundamental Change in the Program.....	263
4. Letter from HUD to MassHousing Regarding Notice of Right to Reasonable Accommodation.....	275
5. Letter from HUD Regional Office of Fair Housing Regarding Opening Waiting Lists.....	279

Chapter 1: COMMONLY ASKED QUESTIONS

The following list of questions is organized by topics and covers the whole occupancy cycle: the application process, tenancy, and eviction.

Many of the answers involve the obligation of housing providers to make reasonable adjustments to their rules, policies, practices, and procedures and to make structural modifications to enable people with disabilities to have an equal opportunity to use and enjoy their unit or a common area¹ throughout the occupancy cycle. This obligation to provide reasonable accommodations and the limits on it are discussed in Chapter 2, Section I.

I. APPLICATION PROCESS

Throughout the admission process you are bound not only by program specific requirements but also by a broad standard of nondiscrimination. The requirement not to discriminate means that you must treat each individual applicant on the basis of her merits; you may not make presumptions about whether someone will be able to comply with the lease based on her disability.² At the time of initial application, you may properly confirm the presence of an applicant's disability if that is necessary to establish eligibility for a particular type of housing or a priority.³ Thereafter, disability must be considered only in the context of rent computation or reasonable accommodation. **In no way does the requirement that you ignore someone's status as a person with a disability limit your ability to determine if she will be a good tenant.** You may continue to use applicant-screening methods designed to determine the likelihood that an applicant will be able to meet the essential requirements of tenancy as expressed in the lease. The questions in this section will help you meet your need to screen tenants adequately without violating federal and state disability discrimination laws.

A. What Housing Providers Must, May, and May Not Ask Applicants

You are permitted to make investigations to determine whether applicants will be good residents of public and assisted housing. You are not permitted to ask questions which require someone to reveal information that is irrelevant to this determination. Congressional and HUD requirements are very specific, but vary from program to program.

1. WHAT MAY I ASK AND WHAT MUST I ASK AN APPLICANT FOR HOUSING?

Housing providers may ask only questions relevant to eligibility and suitability for the housing program. Federal law regarding who qualifies for HUD's Section 8 Housing Choice Voucher Program⁴ requires PHAs that administer this program to screen for drug abuse and other criminal activity. Such PHA's must deny admission for specified criminal activity, and may therefore ask questions to determine the necessary information, as follows:

1. Whether any member of the household is subject to a lifetime registration requirement (Massachusetts Level II and III) under a State sex offender registration program. (If yes, the applicant subject to the lifetime registration requirement must be permanently excluded.)
2. If a household member has been evicted from federally assisted housing for drug related criminal activity; if yes, the PHA must deny admission to the program for three years from the date of the eviction. It **may** choose to extend the time frame. However, the PHA may admit the household if the PHA determines that the circumstances leading to the eviction no longer exist, such as if the offending family member is in jail or otherwise no longer with the family, or that the evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehab program approved by the PHA.
3. Whether any household member is currently engaged in illegal use of a drug; if yes, the person **must** be excluded.⁵
4. Whether there is reasonable cause to believe that a household member's illegal use of drugs or a pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; if yes, the person **must** be excluded unless the person can demonstrate that they are no longer using drugs illegally and that the former behavior is unlikely to recur.

A PHA **may** also develop admission standards which prohibit admission of a household to the program if any member is currently engaged in, or has engaged in during a “reasonable” time, drug or violent criminal activity or other criminal activity which may threaten the health or safety of other relevant parties (residents, neighbors, property management staff or visitors to the development). If a PHA adopts such standards, the application may include questions to determine whether the applicant meets the standards. Note: none of these standards and questions allows questions directly about covered disabilities, such as “do you have a history of illegal drug addiction” or “are you an alcoholic?” An appropriate question for these standards might be phrased as follows: “Does any family member have a pattern of abuse of illegal drugs or abuse of alcohol that has threatened or would threaten the health, safety and right to peaceful enjoyment of others?”

5. Whether any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing; if yes, the person **must** permanently be excluded.

6. Whether there is reasonable cause to believe that a household member’s abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; if yes, the person **must** be excluded unless the person can demonstrate that they are no longer using or abusing alcohol and that the former behavior is unlikely to recur.

In addition to these questions, PHAs must continue to ask:

- a. whether the applicant and family members meet Social Security number requirements;
- b. what the family needs for apartment size;
- c. whether the applicant owes any rent/debt to a housing authority or agency from a prior federal public housing or Section 8 tenancy and, if so, whether the applicant has made and kept current with an acceptable repayment plan;

- d. whether the applicant and family members satisfy the non-citizen rule; and
- e. whether the applicant qualifies for any applicable preference.

If a PHA receives HUD funding targeted for families with disabilities, the PHA may confirm the existence of a qualifying disability because this is an eligibility criteria. This means that a manager may confirm that an applicant meets the disability definition required by that development's funding source. The PHA may not, however, ask disability related questions that are unnecessary to determine eligibility.

Housing authorities administering a state rental voucher program may ask questions designed to determine eligibility for the rental voucher, such as income, family size, criminal and drug or alcohol-related tenancy problems as described above, etc. If a person must have a disability to be eligible for the rental voucher, the public housing authority may ask the applicant if he/she has the qualifying disability.⁶

THE PUBLIC HOUSING PROGRAM (UNITS CONTROLLED BY THE PHA)

PHAs are responsible for screening for both eligibility (meeting program and project qualifications) and suitability (ability to be a good tenant). PHAs have great latitude in their ability to screen for anything related to an applicant's ability to comply with the lease. PHAs may ask all applicants questions that relate to the ability to meet the requirements of the lease, including questions relating to criminal activity. However, it would be discriminatory to ask certain questions only of people with disabilities or people you think have a disability.

Although details vary, the essential obligations for all leases are the same: full and timely payments, care of the premises, not interfering with the rights of others, avoiding criminal or alcohol and drug-related activity as described above and complying with other reasonable requirements for running the development. The following are questions which relate directly to the essential obligations of lease compliance:

- a. Will the applicant pay rent and other fair charges in a timely manner?
- b. Will the applicant care for and avoid damaging the unit and the common areas, use facilities and equipment in a reasonable way, create no health, safety or sanitation hazards, and report maintenance needs?
- c. Will the applicant avoid interfering with the rights and enjoyment of others and avoid damaging the property of others?
- d. Will the applicant avoid criminal activity that threatens the health, safety, or rights of others and avoid drug-related criminal activity?
- e. Will the applicant comply with necessary and reasonable house rules, program requirements of HUD and the housing provider, and with health and safety codes?

In accordance with federal law,⁷ PHAs must screen all applicants for drug and criminal activity in the same manner as the Housing Voucher Program. Likewise, a PHA may also develop admission standards which prohibit admission of a household to its public housing program if any member is currently engaged in, or has engaged in during a “reasonable” time, drug or violent criminal activity, or other criminal activity which may threaten the health or safety of other relevant parties (residents, neighbors, property management staff or visitors to the development).⁸ If a PHA adopts such standards, the application may include questions to determine whether the applicant meets the standards.

Note: none of these standards and questions allows questions directly about covered disabilities, such as “do you have a history of illegal drug addiction” or “are you an alcoholic?” An appropriate question for these standards might be phrased as follows: “Does any family member have a pattern of abuse of illegal drugs or abuse of alcohol that has threatened or would threaten the health, safety and right to peaceful enjoyment of others?”

ASSISTED HOUSING PROVIDERS

Assisted Housing Providers, like PHAs, have great latitude in screening applicants to determine ability to comply with the lease. Also, HUD requires assisted providers, like PHAs, to screen applicants to assisted units for drug abuse and other criminal activity. They **must** prohibit admission of individuals for the same reasons described on page 2, except assisted providers are permitted, but not required to deny admission to a household if a member was convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing. They are also required to adopt a standard to deny admission of a household if any member is currently engaged in, or has engaged in during a “reasonable” time, drug or violent criminal activity, or other criminal activity which may threaten the health or safety of other relevant parties (residents, neighbors, property management staff or visitors to the development).⁹ Under such standards, the application may include questions to determine whether the applicant meets the standards. Note: none of these new standards and questions allows questions directly about covered disabilities, such as “do you have a history of illegal drug addiction” or “are you an alcoholic?” An appropriate question for these standards might be phrased as follows: “Does any family member have a pattern of abuse of illegal drugs or abuse of alcohol that has threatened or would threaten the health, safety and right to peaceful enjoyment of others?”

2. MAY I ASK AN APPLICANT IF SHE HAS A DISABILITY?

The general rule is you CANNOT ask a person if she has a disability, about the nature or severity of a disability or any question that would require her to waive or disclose a medical condition or medical history.¹⁰ Nor can you ask whether any member of the applicant’s family or any friend or associate has a disability. For example, you cannot ask the following kinds of questions:

- a. Have you ever been treated by a psychiatrist?
- b. Have you ever taken or do you take prescription drugs?
- c. Have you in the past attended any self-help groups?
- d. Have you ever been in a detox program?
- e. Have you ever been hospitalized for a psychiatric disability?

- f. Have you been in the hospital recently?
- g. When was the last time you visited a doctor?
- h. Can you live independently?¹¹

In addition, in the reasonable accommodation context, HUD has determined that housing providers may not ask a person to verify her disability and/or need for a reasonable accommodation if the disability and/or need is obvious or known to the provider. If the person's disability is known or obvious, but the need for the accommodation isn't readily apparent or known, a housing provider may request information needed to evaluate if the person needs the accommodation as a result of her disability, in other words, if there is a nexus between the person's disability and the requested accommodation.¹²

EXCEPTIONS

There are some exceptions to the general rule that a housing provider cannot ask whether an applicant has a disability or a question that would necessitate the person revealing a disability or the nature or severity of a disability:

- a. if the person has applied for housing designated for individuals with disabilities or a certain type of disability or a preference based on a disability and the disability is not obvious or known to you, you may ask the person if she has a qualifying disability and ask for verification;¹³
- b. if the person is trying to qualify for allowances that reduce her rent on the basis that she has a disability and the disability is not obvious or known to you, you may ask the person to verify that she has a disability. Disability related expenses must be verified;¹⁴
- c. if an applicant requests that you provide reasonable modifications or accommodations and the disability and the need for accommodation is not obvious or known to you, you may ask the person to document that she has a disability and needs the requested accommodation to remove a barrier to

equal opportunity to apply to or participate in the housing program ¹⁵

- d. if the screening process reveals negative information about a person's past tenancies, you can ask the person to explain the negative information. The explanation may require the person to reveal information about the existence, nature or severity of her disability. The person may still decide not to say anything about the disability. That is the person's right. You, however, have the right to reject a person for unexplained negative information related to the applicant's ability to comply with the terms of the lease.

NOTE: HUD has required language regarding confidentiality on all verification permissions signed by applicants and residents of federally-financed housing. It would be good business practice for state-funded public and assisted housing providers to use comparable language. The sample forms in the appendix include the required language.¹⁶

3. IF A PERSON IS APPLYING FOR HOUSING THAT IS DESIGNATED FOR INDIVIDUALS WITH DISABILITIES, OR INDIVIDUALS WITH A PARTICULAR DISABILITY, OR A UNIT WITH A SPECIAL FEATURE, WHAT MAY I ASK AN APPLICANT ABOUT HER DISABILITY?

If the person is applying for housing designated for individuals with disabilities, you may ask the person to document that she has a qualifying disability if the disability is not obvious or known to you. If the person is applying for a unit with a special feature designed to assist persons with specific disabilities, you may, if the disability and/or need for the unit features is not obvious or known to you, ask the applicant to verify through a qualified source that her condition warrants the special features.¹⁷ Unless the person is applying for housing designated for individuals with a particular type of disability, such as AIDS, you may not inquire about the nature of a person's disability so long as you have information sufficient to determine eligibility according to the program's standards. A person is not obligated to reveal that she has a disability, but a person without an obvious disability who chooses not to reveal her disability would not be

able to establish eligibility for any of the above options for persons with disabilities.

If the person is applying to housing designated for individuals with a particular disability, you may, if the disability is not obvious or known to you, ask her if she has that particular disability and to document it. You may not ask about the person's health status or any other medical information, except in types of housing that include services as part of the package, for example, congregate or assisted living, 202's, and 811's. Any questions regarding disability in these programs must be limited to what is necessary to determine services. Unless the service information is necessary to determine eligibility (as in some assisted living, for example) service information should be gathered after the eligibility decision.

An applicant may not be required to give you her medical records as proof that she has a disability or a particular disability. The simplest way for an applicant in some federally assisted housing to demonstrate that she has a disability is to show a Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) award letter. If that is not available either because the person doesn't receive benefits or can't locate the award letter, or the federal housing program doesn't use the Social Security Act's definition of disability (such as the 202 and 811 programs), a letter from the person's doctor or other qualified professional stating that she has a disability that satisfies the eligibility requirement is sufficient documentation.¹⁸ The best way to do this is a simple verification form that quotes the relevant definition and asks a qualified individual to confirm whether or not the applicant meets the definition. It is not necessary that this form be completed by a physician. Other professionals, such as rehabilitation centers, service agencies, self help centers, social workers, or similar professionals may be able to provide such verification. Such verification must be based on knowledge of the individual and of the disability involved. HUD has created sample forms that are contained in the 4350.3.¹⁹

Some state funded housing providers question whether an applicant providing an SSI or SSDI award letter is sufficient documentation for meeting the disability-related eligibility criteria for state-assisted housing in Massachusetts. No regulations, as of this writing, have been issued on this matter.

NOTE: HUD has required language regarding confidentiality on all verification permissions signed by applicants and resident of federally-financed housing. It would be good business practice for state-funded public housing and assisted housing providers to use this language. The sample forms in the appendix include the required language.²⁰

4. WHAT MAY I ASK AN APPLICANT ABOUT HER DISABILITY IF SHE ASKS FOR A REASONABLE ACCOMMODATION?

If the disability and/or need for the accommodation is not obvious or known to you and a person needs a reasonable accommodation in order to apply for housing, you may require documentation (not medical records) that she has a disability and/or that she needs the reasonable accommodation as a result of her disability and that the accommodation will enable her to have an equal opportunity to apply to or enjoy her housing.²¹ You cannot ask the person any questions about the nature or severity of her disability except as it relates to the specifics of an accommodation. For example, if you are trying to accommodate someone with chemical sensitivity, it would be appropriate for you to ask the person what chemicals and products affect her disability.

Note: HUD has required language regarding confidentiality on all verification permissions signed by applicants and residents of federally-financed housing. It would be good business practice for state-funded public and assisted housing providers to use this language. The sample forms in the appendix include the required language.²²

5. IF A PERSON DISCLOSES A DISABILITY, MUST I KEEP THE INFORMATION CONFIDENTIAL?

YES. There are a number of reasons an applicant or resident may disclose he/she has a disability, such as for the purpose of establishing eligibility, rent calculation, or reasonable accommodation. Regardless of the context, you must treat the information you obtain about applicants' and residents' disability in a confidential manner and follow your company's policies as well as legal requirements.²³ For example, if a

person told you during the application process she had a disability, you could not reveal this information to other tenants. You also could not tell another housing provider if she called for a housing reference. In a reference you can and should, however, be honest about whether the person complies with the terms of the lease. Also, federal²⁴ and state²⁵ privacy laws apply to public and assisted housing providers and contain specific requirements regarding the maintenance of private information. Please note that a housing provider may give out a person's private information if the person gives you written permission to do so.

6. FOR THEIR OWN SAFETY MAY I RESTRICT PEOPLE WITH MOBILITY IMPAIRMENTS TO THE FIRST FLOOR OR TO ACCESSIBLE UNITS?

NO. This would be a form of segregation and violate all of the federal and state laws. People with disabilities have a right to make their own decisions about what would be best for them. Owners/managers are not liable for decisions made by applicants or residents. HUD'S website says that an applicant with a disability "may choose not to live above the ground floor because of possible inability to escape a fire. On the other hand, the applicant must be allowed to decide whether the opportunity to live in a 14th floor dwelling unit outweighs whatever safety concerns may exist."²⁶ See next question for discussion of evacuation plans.

7. WHAT RESPONSIBILITIES DOES AN OWNER/MANAGER HAVE FOR RESIDENTS WITH DISABILITIES IN CASE OF A FIRE OR OTHER EMERGENCY EVACUATION?

First, any owner or manager is responsible for keeping all emergency alarms working properly and all exits marked and clear of items that might block passage. This includes proper flashing alarm systems and regular checking to ensure that items stacked near exits would not impede a person with visual impairments, walkers or wheelchairs. Snow and ice at emergency exits must be removed as soon as possible.

HUD recipients must also have emergency evacuation plans for each building. HUD Guidance states that when housing providers are updating this plan, residents should be given the opportunity to decide whether they want the housing provider to provide information regarding special

evacuation needs to the fire and police departments. The guidance further states that the housing provider may share this information with the fire and police departments if consent is given.²⁷

It is recommended that you discuss the evacuation plan at move-in and at re-certification. You may also have all applicants and residents sign a statement acknowledging discussion of any special evacuation needs, but you can't single out people with disabilities for such discussion.

For liability reasons, it is a good business practice for any property owner to do the kind of evacuation planning outlined above. Of course it is important to update your plan regularly so the plan does not become out of date.

8. MAY I ASK AN APPLICANT IF SHE SPENT TIME IN A TREATMENT FACILITY OR HOSPITAL OR IF SHE IS PRESENTLY IN TREATMENT?

If a person discloses that she spent time in a treatment facility to account for where she was for a particular time period, your inquiries must be limited to that verification. You may not ask any questions about the nature of the person's treatment or the nature of her disability or require the person to divulge any other medical information. See question #4, Section D titled "Homelessness, Time in Institution, Other Non-Traditional Tenancies" on page 48 for a complete discussion. Also see question #6, Section B titled "Bad Tenancy History or Criminal Record" on page 34 or a discussion of questions you may be able to ask if an applicant tells you certain problems will not happen because she is in a drug recovery program.

9. IF I MANAGE FEDERALLY FUNDED PUBLIC OR ASSISTED HOUSING OR A SECTION 8 VOUCHER PROGRAM, WHAT MUST I DO TO SCREEN APPLICANTS IN REGARD TO ILLEGAL USE OF A CONTROLLED SUBSTANCE AND USE OR ABUSE OF ALCOHOL?

Federal law requires federally-financed public and Section 8 voucher programs,²⁸ and assisted housing²⁹ to establish standards (policies and procedures) designed to screen out any person who the housing provider determines is illegally using a controlled substance or has behavior resulting from a pattern of using a controlled substance that will interfere with the health, safety, or right to peaceful enjoyment of other residents.

The law also requires such housing providers to establish policies and procedures that prohibit admitting any person who the PHA, assisted housing provider, or Section 8 administering agency has reasonable cause to believe abuses alcohol or has a pattern of abusing alcohol in a manner that may interfere with the health, safety, or right to peaceful enjoyment of other residents. HUD issued a final rule describing the screening procedures required.³⁰ In September 2003 HUD revised Handbook 4350.3 “Occupancy Requirements of Subsidized Multifamily Housing Programs” incorporating the requirements mandated by the Final Rule.³¹

Neither the law nor HUD’s Notices or Handbooks describe what questions a PHA, Section 8 administering agency, or assisted housing provider must or may not ask. However, it is clear that screening should focus on an applicant’s history of tenancy related behavior resulting from the use or abuse of illegal drugs or alcohol and not on her status as a person with a disability (i.e., someone with alcoholism or a history of illegal drug use).

Focusing on behavior, not disability status, will ensure effective screening and compliance with fair housing laws.

Language in the new statutes (“notwithstanding any other law”) means that covered public and assisted housing providers must carry out the screening and eviction procedures described here, regardless of other laws. However, federal fair housing requirements have never prohibited a public or assisted housing provider from identifying and screening out persons whose use of alcohol or illegal drugs have caused or would cause lease problems. HUD’s updated screening requirements stipulate that covered housing providers must comply with federal disability discrimination laws when they implement the new screening requirements. The following questions and answers will help housing providers achieve the proper balance.

10. MAY I ASK AN APPLICANT IF SHE CURRENTLY ILLEGALLY USES DRUGS?

HUD’s policies on screening and eviction for drug abuse and other criminal activity mandate that providers not admit current illegal users of a controlled substance.³² Therefore, although HUD’s Criminal and Drug

Screening Standards³³ does not specify that a housing provider may ask whether an applicant is currently illegally using drugs, one may conclude that this question is legal because it is one method of screening for current illegal drug use. In addition, asking this question does not violate federal or state disability discrimination law because illegal drug use is not protected.³⁴ You must, however, ask all applicants the same question. You cannot ask a particular question only of individuals with disabilities or those individuals who you think have a disability, or individuals based on another protected basis such as race or national origin.³⁵

None of the federal fair housing laws define “current” clearly. The ADA’s Title II and Title III regulations describe it as “illegal use of drugs that occurred recently enough to justify a reasonable person’s belief that a person’s drug use is current or that continuing use is a real and ongoing problem.”³⁶ HUD’s regulations on screening and eviction and the 4350.3 Handbook which incorporated these changes also use a “reasonable belief” standard.³⁷ Although neither §504 nor the FHAA defines current illegal use of a controlled substance, the legislative history of the ADA indicates that use within the last month is “current” and that the phrase has the same meaning under §504 as under the ADA.³⁸

One federal court interpreted the FHAA’s exclusion of “current, illegal use or addiction to a controlled substance” and found that under the particular circumstances of the case, an individual who was drug free for one year and involved in a continuing professional rehabilitation and monitoring program related to his/her drug use was not excluded from the protection of the federal law.³⁹ Massachusetts Fair Housing law doesn’t provide a definition of “current” use, but MA law governing eligibility to state subsidized housing defines “current” as any use within the last year, but allows a person to present evidence to rebut that statutory presumption.⁴⁰

11. MAY I ASK AN APPLICANT ABOUT PAST ILLEGAL DRUG USE WITHIN A SPECIFIED PERIOD OF TIME?

As explained in the previous question, federal disability discrimination law and HUD’s screening policies permit housing providers to ask about current illegal drug use but do not define “current.”

For clarity reasons, many housing providers would prefer a blanket policy that anyone who illegally used a controlled substance within a set period of time was a current user or a blanket policy that someone who used within a period of time was presumed to be an illegal user unless the applicant could make a convincing showing that she had stopped illegally using a controlled substance. Many advocates and housing providers do not believe such policies are legal. The answer to this question is complicated, especially in light of HUD's policies, which allow Tenant Selection or Admission and Occupancy policies to delineate a time frame prior to the admission decision during which the applicant must not have engaged in drug-related criminal activity.⁴¹

However, while all federal and state fair housing laws allow exclusion of current users, the situation becomes more complicated when clean time duration rules go beyond the admittedly unclear definition of current user in those laws because disability discrimination law also mandates individualized consideration of persons with disabilities. This would seem to require reasonable accommodation exceptions to such blanket policies (except in instances when such a blanket policy is an eligibility requirement of a specialized housing funding source, such as certain treatment or transitional housing programs.) Because of these apparent contradictions, advocates believe that, at a minimum, questions regarding a time frame for illegal drug use must focus on determining whether someone is a current user and/or whether someone's pattern of illegal drug use may interfere with other residents' quiet enjoyment.

12. MAY I ASK AN APPLICANT IF SHE DRINKS ALCOHOL, HOW MUCH SHE DRINKS, OR HOW OFTEN SHE DRINKS?

NO. Alcohol is a legal drug and the use of alcohol as such is not a basis for denying someone housing. Furthermore, federal disability discrimination law covers alcoholism which must be treated like every other disability. Screening must focus on the applicant's tenancy-related behavior, not her disability. Some individuals with alcoholism never engage in behavior that would violate the lease; those whose tenancy history shows lease violations may be rejected on the same basis as any other applicant with that type of lease violation in their history. If the applicant can demonstrate some change or reasonable accommodation

that suggests the negative tenancy related behavior would not recur, federal discrimination law requires a housing provider to consider that information. The housing provider makes the final decision as to whether the change would in fact make the person a reasonable tenant. An applicant can, of course, challenge that decision.

HUD's policies require public and assisted housing providers and administrators of the Section 8 program to establish standards which prohibit the admission of applicants when the housing provider determines it has reasonable cause to believe the applicant or household member abuses alcohol or has a pattern of abusing alcohol in a manner that may interfere with the health, safety, or right to peaceful enjoyment of other residents. As with illegal drug use, HUD's policies do not discuss actual questions. However, both the policies and the relevant statutes require housing providers to focus on past tenancy related behavior rather than on whether or how often the person drinks alcohol or whether the applicant has alcoholism.⁴² In addition, as explained in Question #9, HUD's screening policies require housing providers to abide by federal laws prohibiting discrimination against persons with disabilities when implementing the screening provisions. The following types of questions therefore may be permitted:

- a. Do you abuse alcohol or have a pattern of abusing alcohol in a manner that may interfere with the health, safety, or right to peaceful enjoyment of other residents?
- b. Did you ever interfere with the health, safety, or right to peaceful enjoyment of other residents as a result of alcohol abuse?

13. MAY I ASK AN APPLICANT IF SHE HAS A HISTORY OF ALCOHOL ABUSE OR ILLEGAL DRUG USE?

NO, unless you need to ask these questions to determine if someone meets a specific eligibility requirement such as a programmatic definition of current illegal drug user for public or assisted housing. (See questions 8 through 12 above for further explanations.) Remember, there is a big difference between eligibility requirements and the determination of whether someone is suitable for public or assisted housing. Applicants who have a history of alcohol abuse or illegal drug use are covered by

federal disability discrimination laws and cannot otherwise be asked these questions.

14. MAY I REQUIRE ALL APPLICANTS TO SIGN A CONSENT FORM FOR OBTAINING INFORMATION FROM A DRUG ABUSE TREATMENT PROGRAM?

HUD's screening policies⁴³ allow PHAs to adopt Admissions and Occupancy policies that require each applicant to submit one or more signed consent forms for the head, spouse (regardless of age) and all other household members 18 years of age or older, requesting any drug abuse treatment facility to inform the PHA whether the drug abuse treatment facility has reasonable cause to believe that the household member is currently engaging in illegal drug use. A PHA which includes such provisions in its administrative plan may request such information from a drug treatment facility before admitting any family to the PHA's public housing program using either of the following policies:

- 1) The PHA submits the request for all members of every family as described above; or
- 2) Only household members:
 - Whose criminal record indicates prior arrest or conviction for any criminal activity that may be a basis for denial of admission; or
 - Whose prior tenancy records indicate that the household member engaged in destruction of property, violent activity against another person, or interfered with the quiet enjoyment of other residents.⁴⁴

A PHA with such a policy must establish and implement a system of records management that ensures that such information is kept confidential, not misused or improperly disseminated, and destroyed within the time frame stated in the regulations.⁴⁵ The PHA may not pass on the cost to the applicant any fees for obtaining such information.⁴⁶

There is nothing in HUD Handbook 4350.3 REV-1 that requires or specifically prohibits assisted housing providers from having such provisions in their Tenant Selection Plans. Like PHAs, assisted housing providers may not pass on the cost of screening to applicants.⁴⁷

15. MAY I ASK AN APPLICANT IF SHE HAS A CRIMINAL RECORD?

YES. Federal law⁴⁸ now requires PHAs and assisted housing providers to screen for certain criminal behavior, and permits providers to screen for other criminal behavior. (See Question 15 above). Asking an applicant if she has a criminal record is one method of screening. The focus of any inquiry regarding a person's criminal record should be related to determining whether the person should be rejected because her past criminal activity indicates that she will not be lease-compliant. For example, you could ask, "Have you or any family member listed on this application been involved in any criminal activity that might adversely affect the health, safety or welfare of other tenants?" should it happen at the housing to which she is applying. You could also list specific types of crimes.

HUD's Final Rule on Screening and Eviction for Drug Abuse and Other Criminal Activities, which was incorporated into HUD Handbook 4350.3, authorizes the National Crime Information Center, police departments, and other law enforcement agencies, upon request, to provide PHAs that administer the Section 8 program and/or the public housing program with the criminal conviction records of adult applicants for purposes of applicant screening, lease enforcement, and eviction.⁴⁹ PHAs may also obtain information relating to any criminal conviction of a juvenile to the extent allowed by the applicable state law. Massachusetts state law does not permit access to juvenile records, but does permit access to records of juveniles tried as adults.

If you are an owner of a HUD Multifamily Housing site covered by HUD Handbook 4350.3 Rev-1, you may request that the local PHA obtain criminal conviction records of an adult household member or juvenile tried as an adult for the purpose of applicant screening. The provider's request must include its standards for prohibiting admission of drug and other criminal activity. Likewise, owners of HUD Multifamily Housing sites may request a PHA to obtain criminal conviction records in connection with lease enforcement or eviction. If an assisted housing provider intends to use PHA determination for lease enforcement other than eviction, the request must include the owner's standards for lease enforcement because of criminal activity of household members. The PHA may charge an owner a fee for this determination and pass on any related costs. The

housing provider may not pass on the cost of a criminal record check to an applicant or tenant.⁵⁰

Under federal law, a PHA must provide the applicant or tenant with a copy of the record and provide an opportunity to dispute the record before taking any adverse action based on an applicant's criminal record. The PHA must maintain any criminal record in a confidential manner, not misuse or improperly disseminate it, and destroy the record once the purpose for which the record was obtained has been accomplished.⁵¹

Housing providers in MA may, for the purpose of screening applicants, have access to standard Criminal Offender Record Information (CORI) via the internet through the Department of Criminal Justice Information Services' (DCJIS) website.⁵² The standard access CORI report will contain: all convictions for murder, manslaughter and sex offense convictions; any felony convictions that occurred within the last 10 years or for which the applicant was incarcerated within the last 10 years; and convictions for any misdemeanor convictions that occurred within the last 5 years or for which the applicant was incarcerated within the last 5 years. It will also include any criminal charges pending as of the date of the request, including open cases that have been continued without a finding. Sealed records will never appear on a CORI report, and the report will not show that a sealed record exists.⁵³

The DJIS has regulations which set forth procedures housing providers that request CORIs for the purpose of screening applicants for rental housing must follow.⁵⁴ The procedures address a number of topics including storing and disseminating CORI received during the evaluation of applicants for rental or lease housing.⁵⁵ These requirements include providing a copy of the CORI before asking the housing applicant any questions regarding the housing applicant's criminal history and making an adverse housing decision based on the housing applicant's CORI or other criminal history.⁵⁶ There are also specific requirements a housing provider must follow if they use a Consumer Reporting Agency (CRA) to request CORI regarding a housing applicant.⁵⁷

All CORI information is confidential. Hard copies of CORI are required to be stored in a separate locked and secure location, such as a file cabinet.

Electronically-stored CORIs must be password protected and encrypted and cannot be stored using public cloud storage methods. Regardless of the retention method, only employees who have approved CORI access may be permitted access.⁵⁸ Also, a housing provider cannot retain a CORI for longer than seven years from the last date of residency of the housing applicant in the housing unit owned or managed by the requesting housing provider or the date of a housing decision regarding the housing applicant, whichever is later⁵⁹ In addition, there are specific requirements regarding how criminal records must be destroyed.⁶⁰

16. IF SOMEONE HAS A HISTORY OF ALCOHOL ABUSE, BUT THERE IS NO BAD TENANCY HISTORY OR CRIMINAL RECORD, MAY I ASK THE PERSON TO VERIFY THAT SHE IS NOT CURRENTLY ABUSING ALCOHOL AND/OR IS ENGAGED IN TREATMENT?

NO. Unless someone with alcoholism has a bad tenancy history or criminal record related to the alcoholism, you have no basis for asking the person to verify that she is not currently abusing alcohol or is engaged in treatment. You have to distinguish between a person's disability and her behavior as a result of the disability. You must always look at the person's tenancy and/or criminal history, not her disability, to determine whether she will be a good tenant.

17. IF AN APPLICANT WITH A PSYCHIATRIC DISABILITY OR A HISTORY OF PSYCHIATRIC DISABILITY DOES NOT HAVE A BAD TENANCY RECORD, MAY I ASK HER TO VERIFY THAT HER DISABILITY WILL NOT AFFECT HER CAPACITY TO BE A GOOD TENANT?

NO. Unless someone with a psychiatric disability or a history of a psychiatric disability has a bad tenancy history or criminal record, you have no basis for asking the person to verify that her disability will not affect her capacity to be a good tenant. You cannot assume that all, or substantially all, people with a certain covered disability will not comply with the terms of the lease. You must make judgments based solely on an individual applicant's tenancy and/or criminal history, not her disability status.

18. IF SOMEONE WITH A HISTORY OF ILLEGAL DRUG USE HAS NO BAD TENANCY HISTORY OR CRIMINAL RECORD, MAY I ASK THE

PERSON TO VERIFY THAT SHE IS NOT CURRENTLY USING ILLEGAL DRUGS?

NO, because it would violate federal disability discrimination law, unless this information is relevant because of a program funding eligibility requirement that you must comply with or you have reliable information that the individual's drug use is current.⁶¹ (See Chapter 2, Section F, Question 2 beginning on Page 94 as to the uncertainty regarding the exact meaning of "current" under federal disability discrimination law and Questions 8 and 9 in this section regarding the eligibility requirement for state-funded housing in Massachusetts regarding "current use".)

Federal law is clear that housing managers may exclude "current" users of illegal drugs. Massachusetts disability discrimination law doesn't include in the term disability "current illegal use of a controlled substance."⁶²

HUD's screening policies require PHAs to establish standards which prohibit the admission to any public housing unit or Section 8 voucher program of any person when the PHA determines it has reasonable cause to believe that person has a pattern of illegal use of a controlled substance that may interfere with the health, safety, or right to peaceful enjoyment of other residents. HUD's 4350.3 Handbook has incorporated the requirements of the Final Rule.⁶³

HUD does not indicate whether simply finding out that the person has a criminal record or a history of illegal drug use absent bad tenancy is sufficient to warrant requiring the applicant to verify that she is not currently illegally using a controlled substance or whether a person may be excluded solely on that basis. The regulations and HUD Handbook 4350.3 permit housing providers to establish suitability standards beyond those required by HUD. However screening procedures must comply with disability discrimination laws which prohibit discrimination solely on the basis of a history of a disability and may not impose a greater burden on persons with disabilities, in this case addiction to an illegal substance.⁶⁴ Note that not everyone with a history of illegal use of drugs meets the definition of "person with a disability", that is a person "with a physical or mental impairment that significantly interferes with one or more major life activities, a history of such or being perceived as such." Persons who do

not meet the definition are not covered and hence excluding them would not violate fair housing laws.

In Massachusetts, state-funded public or MassHousing-assisted housing providers must deny a person who has a history of illegal drug use within the last twelve months unless the person can show that she has permanently ceased all illegal use of controlled substances.⁶⁵

B. Bad Tenancy History or Criminal Record

Many housing managers have raised the concern that disability discrimination laws require them to admit applicants who have bad tenancy histories and/or criminal records and who cannot comply with the essential provisions of the lease. This is not true. The questions below explain what you can and must do if an applicant with a disability has a bad tenancy history or criminal record as a result of her disability.

1. **MAY I REJECT AN APPLICANT WITH A BAD TENANCY HISTORY OR CRIMINAL RECORD?**

YES. Any housing provider may reject an applicant with a bad tenancy history or criminal record. Also, depending on the type of housing you manage and the type of bad tenancy history or criminal record an applicant has, you may be required to reject her. Before discussing when you must reject an applicant it is important to mention that those financed by MassHousing are required to consider mitigating or extenuating circumstances for all applicants if an applicant makes such information known to the housing provider before being rejected. Applicants who are rejected from MassHousing-financed developments also may request a Rejection Conference to consider such information (as well as other issues) if the applicant had not provided such information before the rejection. An applicant may present facts that overcome or outweigh negative screening information and are sufficient to convince the housing manager that the applicant will comply with the lease.

Assisted properties not financed by MassHousing do not have to consider extenuating circumstances for applicants unless the applicant has a disability and there is a nexus between the reason for the rejection and the applicant's disability. HUD Handbook 4350.3 on Occupancy in

Multi-Family Housing makes consideration of extenuating circumstances optional unless it is a reasonable accommodation.⁶⁶

Historically, PHAs have been required to consider mitigating circumstances in all instances. HUD's regulations require that PHAs shall consider the time, nature and extent of the applicant's conduct, but consideration of "factors, which might indicate a reasonable probability of favorable future conduct"⁶⁷ is permitted, but not required. HUD's PHA regulations do not address consideration of mitigating circumstances as a reasonable accommodation when the reason for the rejection is connected to the applicant's disability. However, HUD's notices regarding non-discrimination and accessibility for people with disabilities to PHA's do address this and require consideration of mitigating circumstances if requested as a reasonable accommodation.⁶⁸

Under Massachusetts state law, state-financed PHAs or MassHousing-financed properties must disqualify any applicant for state-funded public housing with a bad tenancy history or criminal history which, if repeated by a tenant in public or assisted housing, would interfere with other tenants' quiet enjoyment.⁶⁹ This statute requires PHA's to consider mitigating circumstances prior to rejection. MassHousing-financed properties may reject first and consider mitigating circumstances upon appeal.

Assisted housing providers and PHAs must also reject applicants for federally funded public housing or the Section 8 program if they have been evicted for drug-related criminal activity within the last three years. Providers may waive this requirement if an applicant demonstrates that she has successfully completed a rehabilitation program approved by the housing provider or that the circumstances leading to the eviction no longer exist.⁷⁰ The example cited in HUD's Final Rule explaining this requirement, which is also contained in the 4350.3, is the individual involved in drugs is no longer in the household because the person either died or is in jail.⁷¹

Assisted housing providers and PHAs must also reject applicants for federally-funded public housing or the Multifamily housing if:

1. Any member of the household is subject to a lifetime registration requirement under a State sex offender registration program;⁷²

2. Any member of the household is currently engaged in illegal use of a drug (controlled substance);
3. The provider has reasonable cause to believe that a household member's illegal use of drugs or a pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents;
4. The provider has reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

Covered providers must also reject applicants for federally funded public housing or Multifamily housing programs if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

Under the same law, providers may also develop admission standards which prohibit admission of a household to the program if any member is currently engaged in, or has engaged in during a "reasonable" time, drug or violent criminal activity, or other criminal activity which may threaten the health or safety of other relevant parties (residents, neighbors, property management staff).

2. HOW DO I KNOW IF A PERSON'S POOR HOUSING HISTORY IS A RESULT OF A DISABILITY?

There are a number of ways that you may know that a person's poor tenancy history is a result of her disability: (a) the person may disclose the information; (b) a landlord reference may disclose the information despite federal and state confidentiality laws prohibiting them from doing so; and/or (c) some other reference may disclose the information. Since you will not necessarily know that a poor tenancy history is a result of a disability and could be corrected, all rejections should include a statement that people who have a disability who have been rejected for reasons which are a result of the disability have a right to request a reasonable accommodation, including consideration of mitigating circumstances. Housing providers should also indicate that people who have a disability

have a right to a reasonable accommodation if such a reasonable accommodation could or has corrected the tenancy related problem. A letter from HUD's former Director of Program Compliance and Disability Right to MassHousing (see Appendix) indicates that this is a requirement, but this requirement was not included in the HUD Handbook 4350.3.⁷³

In any case, MassHousing-financed housing providers must state in rejection notices that the applicant has the right to request a reasonable accommodation if the applicant was rejected for a reason arising from the applicant's disability and he or she believes that such an accommodation would correct the behavior(s) in question. HUD, however does require that any rejection notice include a notice that applicants with disabilities have the right to request reasonable accommodations to participate in the hearing process.⁷⁴

3. WHAT SHOULD I DO IF THE PERSON'S BAD TENANCY HISTORY OR CRIMINAL RECORD IS A RESULT OF HER DISABILITY?

As explained in Question 1 of this section, if an applicant with a disability requests it, both public and assisted housing managers must consider mitigating circumstances if the negative tenancy-related behavior was a result of her disability. If requested, housing managers also must consider whether any reasonable accommodation is likely to enable the applicant to be lease-compliant even if the applicant was not lease-compliant in prior housing.

Rejections for bad tenancy history or criminal record should give notice that if such a history was as a result of a disability, the housing provider must:

1. Consider mitigating circumstances.
2. Provide reasonable accommodation to persons with disabilities, including any reasonable accommodation that would enable an applicant with a disability to be lease-compliant.
3. Consider any reasonable accommodation request or mitigating circumstance explanation that the applicant makes and determine whether it is reasonable to believe that the

reasonable accommodation or mitigating circumstance explanation would make lease compliance likely.

If a person presents evidence of mitigating circumstances or makes such a reasonable accommodation request, consider carefully whether it is reasonable to believe that the problem would not likely recur. If you have good reason to believe the person is likely to comply with the lease, admit the person. Otherwise, reject the person. Reasonable accommodation doesn't require you to reduce or waive eligibility requirements or essential suitability standards. NOTE: the applicant, not the housing manager, has the burden of documenting mitigating circumstances and verification of need for reasonable accommodation.

a. Examples of Situations That Warrant Admitting an Applicant with a Bad Tenancy History or Criminal Record as a Result of Her Disability

- (1) If the applicant's bad tenancy history was because:
 - (a) she was not receiving any treatment, or the proper treatment, for her disability; and
 - (b) her present treatment will enable the person to be in compliance with the lease.

For example, the applicant's bad tenancy history was as a result of her alcoholism. As a result of the applicant's alcoholism, she lost her job and could not pay rent, banged on her neighbors' doors in the middle of the night seeking alcohol and cigarettes, and engaged in other behavior which was disruptive to her neighbors. The applicant subsequently entered a self-help program in which she remains actively involved, has stopped drinking, is gainfully employed, and no longer bothers neighbors.

- (2) If the applicant's bad tenancy history was due to another housing manager not making a reasonable accommodation for her.

For example, due to an applicant's three-month stay at the hospital for AIDS-related health problems, a public housing authority evicted her based on its policy regarding uninhabited apartments.

(3) If, prior to the problems in the applicant's housing history, she did not know that she had a disability, and she subsequently has gotten effective treatment and is now likely to comply with a lease.

For example, due to hallucinations, the applicant hit the walls and ceiling with a broom, thereby disturbing her neighbors and causing damage to her apartment. At the time, she was not diagnosed as having any disability and was not receiving treatment. Since then, she has been diagnosed as having a psychiatric disability and is now receiving medical treatment so that the behavior has stopped and is unlikely to recur.

(4) If the applicant's past criminal history was as a result of her disability for which she has subsequently received treatment.

For example, an applicant has a criminal history of assault convictions. She shows that the assaults only occurred when she illegally used a controlled substance, and that she subsequently went through rehabilitation, is no longer illegally using drugs, is in a self-help program and has had no violent episodes since being clean.

b. Verifying an Applicant's Assertions Regarding Her Bad Tenancy History

If an applicant asserts that her bad tenancy history is a direct result of her disability and that a change in circumstances warrants your reconsideration, you may require adequate documentation of the following: (1) that the person has a disability (not nature or severity) if the disability is not obvious or known to you; (2) that the bad tenancy history was the result of the applicant's disability; and (3) that because of the change in circumstance, the applicant is likely to comply with the lease.⁷⁵

Although you have the right to verify the accuracy of the applicant's assertions, you do not have the right to make broad medical inquiries into the applicant's disability or treatment or ask the verification source to reveal the applicant's diagnosis. However, if the applicant's poor tenancy history relates to her failure to comply with treatment, you may inquire about the likelihood that the applicant will comply with current treatment. Specifically, you may ask what the reasons are that would cause you to believe that this time the person will follow the treatment plan. The burden is not on you to seek adequate documentation. Rather, it is on the applicant to produce this documentation. You may tell the applicant what kind of information she needs.

Likewise, if an applicant asserts that a reasonable accommodation will enable her to comply with the terms of the lease, you may verify that the assistance is likely to enable the applicant to comply with the lease and that she will accept the reasonable accommodation. If the accommodation involves the provision of services, you may also verify that the services will be provided. The applicant has the burden of showing that the assistance is likely to enable her to comply with the lease and that she will accept the necessary assistance.

c. Type of Verification

The type of verification an applicant will need to provide to demonstrate that her bad tenancy history is a result of her disability and that a change in circumstances warrants your consideration will depend on the specifics of her situation. Such verification might be provided by a doctor or other medical professional, a peer support group, or a non-medical service agency. The housing provider determines whether the documentation is adequate. If the applicant disagrees with the provider's conclusion, she may either appeal in a rejection conference or take legal action.

d. Procedures for Verification

You may ask the applicant who could verify her assertions. You may then either require the applicant to obtain written documentation verifying her claims or you may contact the person named by the applicant for the sole purpose of verifying the applicant's assertions. You will need the applicant to sign a release form. You may not require the applicant to sign a general medical release or ask the verification source to reveal the applicant's diagnosis or any details of treatment. It is best simply to restate the applicant's assertions of the cause for any problems and then the applicant's explanation of what has changed. Then ask the source to verify the assertions and indicate whether the plan is likely to reduce the problem.

NOTE: HUD has required language regarding confidentiality on all verification permissions signed by applicants and residents of federally-financed housing.⁷⁶ It would be good business practice for state-funded public and assisted housing providers to use comparable language. The sample forms in the appendix include the required language and are available on MassHousing's website.

e. Verification Relating to Illegal Drug Use, Alcoholism and Psychiatric Disability

Housing managers often do not know how to verify that an applicant whose bad tenancy history is a result of drug addiction is not currently illegally using drugs and is likely to be a good tenant. Nor do they know how to verify whether an applicant whose bad tenancy history as a result of alcoholism or a psychiatric disability will likely be a good tenant. We have therefore provided some guidance in this area. More than one form of documentation makes a stronger case. How strong a case is necessary depends on the individual's particular history. When an applicant has a history of drug treatment followed by recidivism, more documentation may be necessary to convince a reasonable person that the applicant is not a current user of illegal drugs. The documentation must come from a reliable source. The term reliable is used solely to address the concern that documentation from professionals who have demonstrated a pattern of providing inaccurate information is not

adequate. You cannot decide not to accept verification from someone because of their race or color or because they are a religious leader in a faith you do not approve of. See sample form in the appendix.

f. Methods of Documenting Rehabilitation from Illegal Drug Use and That the Applicant Will Be Able to Comply with the Lease

(1) Verification from a reliable certified drug treatment counselor or program administrator indicating that the applicant is in treatment or has completed treatment, that there is a reasonable probability that the applicant will be successful in refraining from the use of illegal drugs, that the applicant (if in treatment) is complying with the requirements of the treatment program and not currently using a controlled substance.

(2) Verification from a self-help program (e.g., Narcotics Anonymous “trusted servants”) indicating that the applicant has been/is participating in the program, that there is a reasonable probability that the applicant will be successful in refraining from the use of illegal drugs and that she is not currently using a controlled substance.

(3) Verification from a probation or parole officer that the applicant has met or is meeting the terms of probation or parole with respect to treatment and/or illegal use of a controlled substance. (NOTE: probation or parole very often requires drug tests, so such a verification can be quite reliable.)

(4) A voluntary assessment by a substance-abuse professional indicating that the applicant is not currently using and has a reasonable probability of success in refraining from the use of illegal drugs.

(5) Results of a voluntary random drug test if it is conducted according to the National Institute of Drug Abuse Guidelines which only tests for the use of illegal drugs. If the provider agrees to this option, she must pay for all

costs associated with drug testing unless the testing is already taking place under ongoing treatment or probation or is otherwise reimbursed. No cost associated with applying for housing may be passed onto the applicant.

- (6) If the person was in a residential treatment facility, she could ask someone there to complete a reference form designed to determine that she is no longer using illegal drugs and the likelihood that former problems will no longer interfere with lease compliance.
- (7) The individual could provide a reference who can document lease compliant behavior since ending the illegal use of drugs.
- (8) A reference from a reliable individual, such as an employer, documenting compliance in another area of life.
- (9) A letter from a clergy person or other spiritual leader who has knowledge of the person's past illegal drug use and current method of correcting the problems.

NOTE: The list above was produced by the HUD Task Force on Occupancy Standards in Public and Assisted Housing. This list includes possible sources of verification that the applicant is not currently using illegal drugs. **Whether a particular type of verification is appropriate or sufficient evidence in any given case depends on the individual applicant's history and/or the particular information supplied by the verification source.** The housing provider makes the determination; the applicant may appeal a rejection if she disagrees with the provider's determination.

g. Methods by Which an Applicant Could Document Lease-violating Behavior Related to Alcoholism

- (1) Verification from a reliable professional who treated or treats the applicant indicating that she has dealt with or is dealing with the alcoholism and is not likely to engage in behavior that would violate the lease.

- (2) Verification from a 12-step “trusted servant” or meeting secretary stating the applicant is involved in a self-help program and is not likely to engage in alcohol-related behavior that would violate the lease.
- (3) Verification from a probation or parole officer stating the applicant has satisfactorily completed or is completing the terms of probation or parole regarding alcohol.
- (4) Evidence that, after the last documented incident, the applicant has complied with the terms of a lease or acted appropriately in other situations, such as employment.
- (5) Verification from an employer or clergy person or other spiritual leader who has knowledge of the person’s past alcohol-related difficulties and current method of correcting the problems.

NOTE: The HUD Task Force on Occupancy Standards in Public and Assisted Housing produced the list above. This list includes possible sources of verification that lease-related behavior has changed if she has alcoholism. **Whether a particular type of verification is appropriate or sufficient evidence in any given case depends on the individual applicant’s history and/or the particular information supplied by the verification source.** The housing provider makes the determination; the applicant may appeal a rejection if she disagrees with the provider’s determination.

h. Methods an Applicant Can Document That Lease Violating Behavior Related to a Psychiatric Disability Has Changed

- (1) Verification from a reliable professional who treated the applicant indicating that she has received new or more effective treatment for the psychiatric disability and is not likely to engage in behavior that would violate the lease and is now likely to be able to meet the tenancy requirements.
- (2) Verification from a reliable service provider stating that the applicant is receiving support services and there is

good reason to believe the person will now comply with the terms of the lease.

- (3) Evidence that, after the last documented incident, the applicant has complied with the terms of a lease or acted appropriately in other situations, such as employment.
- (4) Verification from an employer or clergy person, or other spiritual leader who has knowledge of the person's past difficulties and current method of correcting the problems.

NOTE: The above list was produced by the HUD Task Force on Occupancy Standards in Public and Assisted Housing. This list includes possible sources of verification that lease-related behavior has changed if she has a psychiatric disability. **Whether a particular type of verification is appropriate or sufficient evidence in any given case depends on the individual applicant's history and/or the particular information supplied by the verification source.** The housing provider makes the determination; the applicant may appeal a rejection if she disagrees with the provider's determination.

4. IF AN APPLICANT SAYS HER BAD TENANCY HISTORY WAS BECAUSE OF HER DISABILITY AND THAT HER CONDITION IS UNDER CONTROL BECAUSE SHE IS NOW TAKING MEDICATION, HOW DO I ENSURE THAT THE APPLICANT CONTINUES TO TAKE HER MEDICATION?

You may ask the applicant to verify that she is presently taking her medication and intends to continue. You cannot require a resident as a condition of tenancy that she document that she continues to take medication. If a resident stops taking medication that she agreed to take, you could not evict her for stopping. You may evict her for serious or continuous lease violations that result from not taking the medication. You may introduce at the eviction proceeding the applicant's statement that taking medication was necessary to avoid problems and that the applicant said she intended to continue to take the medication.

5. MAY I REQUIRE A LEASE ADDENDUM REQUIRING A RESIDENT TO ACCEPT SERVICES OR ATTEND SUPPORT GROUP MEETINGS, SUCH AS ALCOHOLICS ANONYMOUS (AA)?

NO. However, you can condition an applicant's admission to public or assisted housing on her agreement to accept supportive services or attend a self-help group or rehab program if the applicant's tenancy history warrants this. For example, you may plan to reject an applicant because her housekeeping in her previous apartment was poor and therefore, she did not meet the lease eligibility standard. If the applicant explains to you that her disability affects her ability to clean house, but she has contracted with a chore service to keep the new unit clean, you may verify that the applicant has arranged for a chore service and on that basis admit her to the housing if you have reason to believe that the plan will work. You may ask her to sign an agreement stating what both of you agree to do.

You cannot, however, write into her lease that she must accept cleaning services in order to be lease compliant. Nor can you move to evict the person if she terminates the service. However, you may evict her if, after she ends the service, the condition of the apartment violates the lease. You may introduce the original condition of admission as evidence in eviction proceedings.

6. IF AN APPLICANT TELLS ME CERTAIN PROBLEMS WILL NOT HAPPEN AGAIN BECAUSE SHE IS IN A DRUG RECOVERY PROGRAM, DOES IT MATTER HOW LONG SHE HAS BEEN IN RECOVERY?

HUD's Final Rule for Screening and Eviction for Drug Abuse and Other Criminal Activity which amended applicable HUD regulations requires assisted providers and PHAs to establish standards which exclude from any federally-funded public or assisted housing or Section 8 voucher programs any person who the provider determines it has reasonable cause to believe has a pattern of illegal use of a controlled substance that may interfere with the health, safety, or right to peaceful enjoyment of other residents.⁷⁷ The Rule and the statutes on which it is based, do not discuss the length of time in recovery in relation to the various determinations, exclusions, reasonable accommodations or mitigating circumstances. The Rule grants housing providers great latitude in establishing time frames within which applicants must not have engaged in illegal behavior. On the other hand, as explained in Question 3, providers must comply with federal laws prohibiting discrimination against

persons with disabilities. These federal laws require an individualized assessment and therefore suggest that a set period of time is probably not permissible. Instead, federal law indicates you have to ask each applicant with a recent drug history for evidence that she is in fact no longer illegally using drugs and is able to be lease compliant. (An applicant may use various methods to demonstrate this. See the answer to Question #3 in this section for suggestions.) You may consider all relevant facts, including the applicant's history of recidivism in determining the applicant's likelihood to be able to comply with the terms of the lease and whether their pattern of use poses a threat to other residents. How many times the person had gone into treatment, how long the periods of not using were, and the number of relapses would all be factors to consider in determining whether the individual will comply with the lease. The best advice as to a reasonable time for a particular person would come from a treatment program or group that was familiar with the applicant.

In Massachusetts, managers of state-funded public or assisted housing must reject any person who is a current illegal user of one or more controlled substances. Massachusetts' law creates a presumption that a person is a current illegal user of a controlled substance if the illegal use was within the preceding twelve months, but the presumption may be overcome by a convincing showing that the person has permanently ceased all illegal use of controlled substances. In accordance with state law and MassHousing policy, the amount of time a person has been in recovery is relevant to a determination of who is a current user. However, the law still requires an individualized assessment based on the information provided by the applicant.

7. WHAT TYPE OF CRIMINAL HISTORY MAY I CONSIDER IN DETERMINING WHETHER TO DENY SOMEONE HOUSING?

HUD's Final Rule on Drug Abuse and Other Criminal Activity, which was also incorporated into the 4350.3, mandates public housing and federally assisted providers to deny admission based on certain criminal history and allows them to consider other criminal history when determining whether to deny someone housing.⁷⁸ The law mandates exclusion for both types of housing if a household members subject to a lifetime registration requirement under a State sex offender registration program.⁷⁹ Public

Housing providers are also required to prohibit the admission of anyone who has ever been convicted for manufacture or production of methamphetamine on the premises of federally assisted housing.⁸⁰

Covered providers must develop admission standards prohibiting admission if any household member is currently engaged in, or has engaged in within a “reasonable” time, drug or violent criminal activity, or other criminal activity which may threaten the health or safety of other relevant parties (residents, neighbors, property management staff).⁸¹ Examples of such criminal activity include: homicide, rape or child molesting, burglary, robbery, larceny, destruction of property or vandalism, assault or fighting, drug dealing, use or possession of illegal drugs, receiving stolen goods, fraud, prostitution, selling alcohol to minors, disorderly conduct, and similar crimes.

In Massachusetts, PHAs are required to disqualify any applicant for housing, absent mitigating circumstances, who has engaged in criminal activity which if repeated by a tenant in public housing would interfere with or threaten the rights of other tenants to be secure in their persons or property or interfere with their quiet enjoyment. MassHousing policy requires the same in assisted housing financed by this agency.

8. HOW FAR BACK IN SOMEONE’S CRIMINAL HISTORY SHOULD I CONSIDER?

There is no specific answer to this. A good rule of thumb for liability purposes is to follow local industry practice. In Massachusetts, most companies use three to five years. The important thing is to use the same standard for everyone with similar histories. Some companies use a longer period for serious or violent crimes and a shorter period for lesser crimes. Policies should also take into account when a person was released from prison and how much time he or she had to commit new crimes. Regardless of the time stated in your policy, you must be consistent in how you apply the policy.

9. HOW CAN I DETERMINE IF AN APPLICANT’S HISTORY OF CRIMINAL BEHAVIOR IS A RESULT OF HER DISABILITY?

It is not up to you to guess whether the person’s behavior is a result of her disability. It is up to the applicant to reveal the connection between her

disability and the criminal behavior. Do not assume that this is the case if you know the applicant has a disability and do not ask the person if her criminal behavior was caused by her disability.

You have an obligation to consider mitigating circumstances for individuals with disabilities who request it.⁸² You should inform an applicant of this affirmative obligation. It is up to the applicant to demonstrate that the criminal activity was as a result of the disability and to show mitigating circumstances, such as rehabilitation. In either public or assisted housing, you do not have to follow up once you give an applicant notice of her rights.

10. ARE THERE SOME PAST CRIMES RESULTING FROM A PERSON'S DISABILITY THAT ARE SO SERIOUS THAT I CAN DENY SOMEONE WITH A DISABILITY HOUSING WITHOUT CONSIDERING MITIGATING CIRCUMSTANCES?

HUD's Final Rule requires housing providers to deny someone housing, if he/she is subject to a lifetime reporting requirement under a state sex offender registration program. Also, public housing providers must prohibit admission to public housing and the certificate program, if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.⁸³ Since these are required exclusions, a provider can't consider mitigating circumstances for anyone, even if the criminal behavior is a direct result of someone's disability.

For other crimes, if an applicant produces evidence of mitigating circumstances, you must always **consider** such information as a reasonable accommodation if the crime was a result of a disability and you must consider such circumstances if your policies or funding sources require such consideration,⁸⁴ but you should not admit a person unless you are convinced there is good evidence to believe the problem will not recur. The burden for showing that the problem will not recur lies on the applicant. If the applicant shows a causal connection or "nexus" between the history of criminal behavior and her disability, you must engage in an individualized assessment of the applicant's mitigating circumstances and ability to meet the essential lease provisions, with or without reasonable accommodation. If, after engaging in an individualized assessment, you

determine that the applicant is not qualified for housing, then you may decide not to admit her.

An applicant with a disability who has a criminal history for a violent crime must provide you with persuasive documentation that the criminal behavior was as a result of her disability, that she has been rehabilitated and highly unlikely to engage in further violent behavior. The person's history since rehabilitation must confirm that. If you are not convinced, you will need objective reasons to support your position. You will need to show why the threat continues to exist and/or why the proposed reasonable accommodation will not eliminate or sufficiently reduce the risk to others.

C. Reasonable Accommodations

Understanding and implementing reasonable accommodation is essential to complying with federal and state disability discrimination laws. The following questions are designed to assist you in this process.

1. **WHAT DOES MY LEGAL OBLIGATION TO PROVIDE REASONABLE ACCOMMODATION REQUIRE ME TO DO IN THE SCREENING PROCESS?**

a. Physical Access

If you are an assisted housing provider, you must ensure that your screening process is fully accessible to applicants with disabilities. This means that your application office must be physically accessible and located on an accessible transportation route unless it would be an undue financial and administrative burden to do so. If the office is not yet accessible, you must make and publicize arrangements to take the application of someone who needs an accessible office in some other manner. This would include having a sign at the inaccessible entrance and a doorbell or some other way for a person to alert staff in a timely manner to arrange an alternate accessible meeting place. In contrast, HUD requires public housing providers to have all application offices accessible.⁸⁵

b. Meetings with an Applicant

If a person with a disability is unable to come in to pick up an application because of her disability you must accommodate this person's disability. This may mean mailing the person an application or conducting a preliminary interview, if you do them, somewhere else during the application process.

Reasonable accommodation is also required if an applicant with a disability fails to respond to a request for a personal interview or a request for some other information, as a result of her disability (such as memory loss, hospitalization) and her application was rejected or purged from the waiting list as a result. For example, you may have to reinstate the applicant to the waiting list at the original spot, if the failure to comply with the requirements was a result of her disability.⁸⁶

c. Auxiliary Aids and Facilitating Adequate Communication

You must also furnish auxiliary aids⁸⁷ if it is necessary to facilitate communication with someone who has a disability.⁸⁸ An auxiliary aid is something that helps a person give or receive information, but doesn't include individually prescribed devices such as glasses, readers for personal use or study, or other devices of a personal nature. Sometimes this means giving information in a different format -- large print, audiotapes, computer disks. Other times a person may need a sign language interpreter or some other method of enhancing verbal communication. Housing providers should inform all applicants at the initial point of contact that alternative forms of communication can be used.⁸⁹ In determining what auxiliary aids are necessary, you must give primary consideration to the request of the person with the disability.⁹⁰ Documents intended for use by applicants (such as information about the application process, the application form, all form letters, the lease, a statement about reasonable accommodation, all information related to applicants' rights) must be available in fully accessible formats for individuals with vision or hearing impairments. To the extent possible, they must also be written simply and clearly to assist applicants with learning and cognitive disabilities.⁹¹ If requested by such an applicant, housing providers must explain written material verbally, possibly more than once, and if necessary, assist or obtain assistance for the applicant in filling out any necessary forms. If a housing provider is concerned about

liability should there be later disagreement as to accuracy or truthfulness, a housing provider may ask the resident for permission to tape record the application session. The housing provider should give a copy of the tape to the applicant. The housing provider may contract with an individual or agency to provide this service to applicants and residents. Such a contract could be an undue burden in some circumstances. If it were an undue burden it would not relieve a provider from coming up with another solution that did not pose an undue burden.

A service provider, advocate, or friend must be permitted to assist the applicant during the application process if the applicant so chooses. This includes any interviews that may take place.

Remember, Title VI of the Civil Rights Act and HUD's implementation of this rule⁹² may require the provision of auxiliary aides in a person's native language if the person has limited English proficiency (LEP). Materials regarding LEP compliance are available on MassHousing's website.

d. Mitigating Circumstances

Another form of reasonable accommodation that is applicable to the screening process involves the consideration of mitigating circumstances. MassHousing-financed providers are required to consider mitigating circumstances for all applicants. Managers of this housing should inform all applicants of your obligation to consider mitigating circumstances and provide reasonable accommodation for applicants with disabilities. This should be explained as simply as possible.

Public housing providers and assisted housing not financed by MassHousing must consider mitigating circumstances for individuals with disabilities, if requested, as a means of reasonable accommodation.⁹³ If you are an assisted housing manager of a property not financed by MassHousing, you should inform all applicants of this obligation and the obligation to provide other reasonable accommodations in writing or in the format requested by the individual.

e. Meeting with the Applicant Before Rejection

A pre-rejection meeting is not explicitly required by federal statutes or their regulations.⁹⁴ However, some providers inform any applicant facing

rejection that she will be rejected for housing, the reason(s) why, and of her right to explain mitigating circumstances as a reasonable accommodation or when applicable, generally. If you choose to offer to meet with applicants to discuss mitigating circumstances or incorrect information prior to rejecting them, you should also inform them that you have an obligation to consider reasonable accommodation if applicants are unable to comply with the terms of the lease as a result of their disability. Meeting with all applicants who request it does not single out individuals with disabilities for preferential treatment, which some people consider benevolent discrimination. It would enable you to clarify whether there was additional information regarding a person's disability that is relevant to the admission decision, thus saving considerable time and resources dedicated to post-rejection hearings that need not take place.

2. WHEN PHAS ADMINISTER THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM, WHAT TYPE OF REASONABLE ACCOMMODATIONS MUST THEY PROVIDE TO APPLICANTS AND PARTICIPANTS WITH DISABILITIES?

The regulations for the Section 8 Housing Choice Voucher Program (24 CFR PART 982) require PHAs to administer the Section 8 program in conformity with the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (and Title VI of the Civil Rights Act of 1964). These regulations also discuss and authorize the following specific forms of reasonable accommodation for Section 8 applicants and participants with disabilities:

- Reinstatement of an applicant family to the applicant's former position on the waiting list if the applicant did not respond to the PHA's request for information or updates due to a disability;⁹⁵
- Notice that if a family includes a person with a disability, the family may request a current list of available accessible units known to the PHA;⁹⁶
- Extension of the term of the voucher where required as a reasonable accommodation;⁹⁷
- Approval of rental from or to certain groups of related individuals where necessary as a reasonable accommodation;⁹⁸

- Approval of a live-in aide where needed as a reasonable accommodation; and counting a live-in aide approved by the PHA to reside in the unit in determining the family unit size⁹⁹
- Establishing a higher payment standard as a reasonable accommodation;¹⁰⁰
- Use of higher utility allowance as a reasonable accommodation;¹⁰¹
- and, the PHA's duty to consider reasonable accommodation as part of exercising discretion to deny or terminate assistance.¹⁰²

The Housing Choice Voucher Program regulations also provide that costs to cover reasonable accommodation for persons with disabilities is a type of extraordinary cost approved by HUD when a PHA is unable to cover such expenses from ongoing administrative fee income and administrative fee reserves.¹⁰³

3. WHEN IS IT APPROPRIATE FOR A SERVICE COORDINATOR TO BE INVOLVED IN AN APPLICATION PROCESS?

It is appropriate for resident services staff to be involved in an application process only if the applicant requests it or if service coordinators sit in on all application interviews or all of a non-discriminatory class of interviews. (For example, all interviews where an applicant requests an accommodation or something else that requires the expertise of a service coordinator.)

4. IF AN APPLICANT REQUESTS THE SAME REASONABLE ACCOMMODATION THAT FAILED TO RESOLVE LEASE PROBLEMS IN A PAST TENANCY, MUST I PROVIDE IT?

NO. A housing provider need not provide an accommodation that failed in the past unless the applicant can show new circumstances why such an accommodation will likely work now.

Even if the accommodation had worked in the past, you do not automatically have to provide the accommodation. You do not have to provide an accommodation if it will result in a fundamental alteration of the housing program or result in an undue administrative and financial burden. What is “reasonable” for another housing provider may not be “reasonable” for you. The nature of your housing program and your

financial and other resources may be different from another housing provider's housing program and/or financial and other resources.

5. IF A PERSON SEEMS TO NEED A REASONABLE ACCOMMODATION BUT DOES NOT ASK FOR ONE, WHAT MUST I DO?

You should routinely inform all applicants of your obligation to provide reasonable accommodation to individuals with disabilities during the application process.¹⁰⁴ There is also nothing which prevents you from asking all tenants if they understand the information given to them. It is actually good business practice to make sure this is the case. You may also ask anyone who says she does not understand whether she would like you to refer her to someone who could assist her. You are not obligated to do this, but if you do it, you must do it for everyone. Thus, before asking the question, you should know of a referral.

HUD's "Section 504 Frequently Asked Questions" which appears on its website, the Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) Regarding Reasonable Accommodation Under the Fair Housing Act and the Joint Statement of the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) Regarding Reasonable Modifications Under the Fair Housing Act state that a housing provider is only obligated to provide an accommodation/modification if she is on notice of a request, not simply the need, for the accommodation. HUD does state that a person doesn't have to use the term reasonable accommodation/modification, but will be considered to have asked for an accommodation if she indicates that a change or exception to a rule, policy or procedure or physical modification would help her better use her housing.¹⁰⁵ Although this is the prevailing view, some court cases indicate that if the need for a reasonable accommodation is apparent, you must offer to make an accommodation and explain your obligation to do so.¹⁰⁶ You should explain what a reasonable accommodation is since many people have not heard that term. If a particular accommodation is obvious, you could cite it as an example of a reasonable accommodation.¹⁰⁷

6. IF AN APPLICANT REQUESTS AN ACCOMMODATION, MAY I REQUIRE DOCUMENTATION THAT SHE HAS A DISABILITY AND THAT SHE ACTUALLY NEEDS THE ACCOMMODATION?

A housing manager has a right to ask an applicant to document that she has a disability and needs the accommodation only if the disability and/or need is not obvious or known to the manager. The type of verification the applicant will need to provide will depend on the specifics of the situation.¹⁰⁸ Such verification must be provided by someone with appropriate credentials and knowledge of the individual to make an informed judgment. Depending on the circumstance that person could be a medical or rehabilitation professional, a peer support group, or a non-medical service agency. See attached form in the appendix.

7. MAY I REQUIRE AN APPLICANT TO ACCEPT A REASONABLE ACCOMMODATION?

NO. If you ask an applicant if she wants a reasonable accommodation or “assistance,” she has the right to refuse it. However, if the applicant who refuses your offer of an accommodation has a tenancy history that would, without a reasonable accommodation, lead you to reject her, then you may reject the applicant. Likewise, if an applicant is unable to complete the application process, but refuses any accommodation which could assist her, you may reject the applicant.

8. IF AN APPLICANT WITH A PSYCHIATRIC DISABILITY REQUESTS A DOG IN SPITE OF A NO PETS POLICY, MUST I ALLOW IT?

Any determination of whether a request for an accommodation is reasonable must be based on the facts of each case. If an applicant or tenant can provide documentation that she has a disability and that she needs the animal as a result of her disability (that the animal alleviate(s) one or more identified symptoms or effects” of the disability, you must permit the companion animal, which is also called an assistance animal. Companion animals, like service animals, are not subject to pet rules. As such, you may not limit the size or type of an animal unless you can establish that having the animal on site would pose a fundamental change in your program or pose an undue financial and administrative burden. Also, you may always require that a companion/service animal be kept in

a manner that does not result in violations of health and safety standards, state or local animal control ordinances or pose undue damage to property.¹⁰⁹ Also, all federally financed housing (public and assisted) for the elderly and disabled must permit common household pets regardless of disability as long as tenants comply with reasonable pet policies.¹¹⁰ In these developments, reasonable accommodation may still be necessary in cases where a person needs an animal as a result of her disability and the size, type or number of animals needed varies from the site's "pet" policy.

D. Homelessness, Time In Treatment Institutions, Prisons and other Non-Traditional Housing

More and more applicants to public and assisted housing have non-traditional housing backgrounds. This has proven to be a challenge to providers because the traditional means of determining whether someone will be able to comply with the essential lease provisions, making inquiries of the applicant's landlord(s) for a past period of time or conducting a home visit to the current rental unit, are often not available. For example, it might not be helpful to your determination of an applicant's ability to comply with the lease to ask a person at a medical facility or prison where an applicant had spent a significant portion of the last five years the same kinds of questions that you would typically ask a landlord since such facilities are not equivalent to housing; a person does not pay rent, and has no responsibility for maintaining her unit, no opportunity to engage in most criminal conduct and no lease in effect.

This does not mean that it is impossible for you to verify that an applicant without a traditional housing history can comply with the essential provisions of a lease. It means that individuals who have been homeless or institutionalized for some or all of the time period that you review may need assistance in reconstructing their housing histories or finding alternative ways in demonstrating future lease compliance. The questions in this section are designed to show how individuals with non-traditional tenancy histories can establish that they will be good tenants and how you can determine if an applicant who has a non-traditional history will be a good tenant.

1. CAN I DENY AN APPLICANT HOUSING IF SHE HAS BEEN HOMELESS OR IN AN INSTITUTION?

As long as the applicant meets the eligibility and qualification requirements in state and federal regulations (which include ability and willingness to follow the lease), you may not deny her housing because she has been homeless or in an institution or has any other non-traditional housing history. You have the right to ask the applicant for some kind of proof that she will pay her rent on time, properly maintain the unit, not bother the neighbors, or any other relevant information you would usually get from the applicant's former landlord.

2. IF AN APPLICANT HAS NOT HAD A LANDLORD FOR A LONG TIME BECAUSE SHE HAS BEEN HOMELESS OR IN AN INSTITUTION OR LIVING WITH HER FAMILY, HOW CAN SHE SHOW THAT SHE WILL BE A GOOD TENANT?

There are many ways for an applicant to show that she is responsible and will meet the lease eligibility standards. Letters from employers, clergy, neighbors, and staff members of shelters, doctors, or social workers can help you determine whether or not an applicant will meet the lease and other requirements. Use the suggested sources below, which are broken down by types of lease requirements, to verify an applicant's ability to be a good tenant:

a. Paying Rent and Other Charges in a Timely Manner:

- payments of utility, telephone, or cable TV bills
- payments for child support or alimony
- credit card, loan, or layaway payments
- vendor payment or a representative payee (rep payee)
- any other kind of regular payment
- proof of no outstanding debts, liens or defaults or other bad payment history (if the applicant had an opportunity to accrue such a record)
- completion of a residency-training program acceptable to the housing manager

b. Caring For and Avoiding Damaging the Apartment:

- caring for a room or space while living with someone else or in a shelter or group home.
- maintaining any physical space (at a job, etc.)

- chore service or other assistance with care of unit
- live-in or other aide
- successfully answering the housing manager's questions about how to care for an apartment
- completion of a residency-training program acceptable to the housing manager

c. Respecting the Rights of Others:

- people applicant lives with
- institutions, shelters, transitional housing, group homes
- administrators or other staff in treatment programs
- school or work relationships (teachers, counselors, co-workers)
- school records, if recent
- completion of a residency-training program acceptable to the housing manager

d. Avoiding Criminal Activity:

- clean court records or a record unrelated to ability to be a good tenant
- a good probation or parole record

e. Complying with Other Program Requirements:

- job or school references
- shelters or any other programs applicant participated in successfully
- current housing manager (if not homeless)
- school records, if recent
- completing a residency training program acceptable to the housing manager

NOTE: The list above was developed by HUD's Task Force on Occupancy Standards in Public and Assisted Housing. This list includes possible sources of verification of an applicant's ability to be a good tenant. **Whether a particular type of verification is appropriate or sufficient evidence in any given case depends on the individual applicant's history and/or the particular information supplied by the verification source.** The housing provider makes the determination; the applicant may appeal a rejection.

3. HOW DO I GET EVIDENCE REGARDING TENANCY FOR SOMEONE WHO HAS RECENTLY BEEN IN PRISON?

If the crime is one of the mandated exclusions as discussed in Question 7, page 35, of Section B, no further consideration is necessary.

If the criminal behavior would be a lease violation if it occurred while the applicant was a tenant, start by determining whether there is sufficient evidence that the criminal behavior will not be repeated. Most studies show that about 80% of people land in prison as a result of an illegal drug or alcohol problem. If the applicant alleges that to be the case, you would want to assess whether the person met the definition of disability and the likelihood of the person staying free of illegal drug use and alcohol abuse in the same way as described on page 16. The burden of supplying that evidence lies on the applicant.

Other ex-offenders may have psychiatric disabilities that led to their criminal acts and imprisonment. If an applicant makes that claim, you would assess whether the person met the definition of disability and the likelihood of the negative tenancy related problem being under control in the same way as described on page 25.

In the above situations, when negative behavior is a direct result of someone's disability, consideration of mitigating circumstances is a reasonable accommodation. If an ex-offender does not have a disability or if she has a disability, but the criminal behavior is not a direct result of the disability, then a reasonable accommodation is not required. When there is no disability involved in the criminal history, you should make a reasonable decision based on the seriousness of the crime, the opportunity the person has had to commit another crime, the level of probationary or parole supervision, and the consequences of repeating the crime.

4. MUST AN APPLICANT, IN ORDER TO DOCUMENT PAST LIVING SITUATIONS, DISCLOSE THAT SHE LIVED AT A HOSPITAL OR OTHER THERAPEUTIC SETTING WHICH THUS DISCLOSES INFORMATION ABOUT A DISABILITY?

YES. If you ask all applicants (not just those you think have a disability) to document their housing history for the same past period of time. If the

applicant did not live in traditional housing during this period of time, but rather at a medical treatment facility, she should be permitted to get a reliable third person to verify the time period that she was in the medical setting without revealing the name or nature of the medical setting. A reliable person could include a medical professional, a rehabilitation specialist, a clergy person, a shelter provider, or an employer.

Any kind of shelter, transitional or halfway program or supported housing in which the primary purpose is providing housing (rather than treatment) would be a good source of information for tenancy history.

E. Live-In Aides

A personal care attendant (PCA) provides people with disabilities assistance with daily living functions. The type of assistance provided, when the assistance is needed, and whether a person is needed to live-in to provide the necessary assistance is dependent on the applicant/tenant's individual needs.

HUD defines a "live-in aide" as "someone" who:

- (1) Is determined to be essential to the care and well-being of the person(s);
- (2) Is not obligated for the support of the person(s); and
- (3) Would not be living in the unit except to provide the necessary supportive services."¹¹¹

The live-in aide, which is a PCA who "would not be living in the unit unless needed to provide the necessary supportive services" could be a relative only if they met all three of the above criteria, **cannot** qualify for continued occupancy as a remaining family member. The HUD Occupancy Handbook lists as a required attachment a HUD approved live-in aide lease addendum. According to the Handbook, the addendum **must** state that the live-in-aide is not eligible to remain in the unit once the tenant is no longer living there; the addendum **may** also give the owner the right to evict a live-in aide who violates the lease or house rules. The Handbook, however, doesn't appear to waive the requirement that an owner must get HUD approval for such an addendum.¹¹²

1. MUST I ALLOW A PERSON TO HAVE A PERSONAL CARE ATTENDANT (PCA) LIVE WITH HER?

You may not refuse to allow the person to have a personal care attendant live with her if it is essential to accommodate her disability in regards to her tenancy.¹¹³ You may ask an applicant or tenant to document that she needs a live-in PCA, which is commonly referred to as a live-in aide, if the need is not obvious or known (previously documented) to you.

Also, it is important to distinguish between a live-in aide and intermittent, multiple or rotating personal care attendants (PCAs) who do not reside in the unit and would not qualify as live-in aides. An additional bedroom should not be approved for a live-in aide under these circumstances.

NOTE: While it is probably very rare that the need for a live-in aide would be obvious and thus not requiring documentation, applying the HUD Handbook's requirement not to document obvious needs to those cases pose a dilemma if the development receives tax credits. Subsidy monitoring agencies expect such documentation when reviewing files to check for household income. Lack of documentation of the need for a live-in PCA can raise questions about whether the PCA's income should be counted and consequently whether the household is even income eligible. The authors of this Handbook recommend at least that both the tenant and the live-in aide sign affidavits stating 1-3 above and that the live-in aide has no right to tenancy should the person being cared for vacate the unit or die.

2. IS A SINGLE PERSON WHO REQUIRES A LIVE-IN AIDE ENTITLED TO A TWO-BEDROOM UNIT?

YES.¹¹⁴ However, providers are not required to waive the difference in rent between the smaller and the larger unit. Also, if a two-bedroom unit isn't available, the person with the disability has a right to decide if she will accept a smaller unit, provided no health and/or safety rules are violated.

Note: The 4350.3 doesn't state whether a housing provider may permit a Live-in Aide's family member to reside in the unit. However, HUD's Final

Multifamily Mailbox: 4350.3 REV-1 Summary of Questions provides that no other member of the live-in aide's family can live in the unit.¹¹⁵

3. DO I HAVE THE RIGHT TO CHOOSE AN APPLICANT OR TENANT'S LIVE-IN AIDE/PCA? NO.

4. MAY I SCREEN A TENANT'S OR APPLICANT'S PCA?

a. Live-In PCAs

Live-in PCAs are not members of the applicant's or tenant's household for the purpose of calculating rent and do not have any rights of tenants, but they are "occupants" of HUD subsidized housing. Housing providers **must** screen live-in PCA's at initial occupancy "for drug abuse and other criminal activity, including State lifetime registration as a sex offender, by applying the same criteria established for screening other applicants."¹¹⁶ Owners may also apply their other relevant screening criteria. For example, because the PCA does not pay rent, the housing provider cannot screen for the ability to pay rent. It is highly recommended that you screen for relevant tenancy related behavior in the same fashion all live-in providers, whether the person is a PCA or, in the case of market tenants, a live-in child care provider or housekeeper. **NOTE:** A night PCA who does not live in the unit (keep her belongings there) is not a live-in PCA.

b. Live-Out PCAs

You may only conduct screening of non-live-in PCAs if you conduct screening of everyone who works for tenants or who works in the building. Some advocates believe that such screening may violate federal and state laws if it affects people with disabilities more than people without disabilities.

5. MAY I CHECK THE CRIMINAL RECORD OF AN APPLICANT'S OR TENANT'S PCA OR PROSPECTIVE PCA?

Neither state or federal disability discrimination law address this issue. HUD Handbook 4350.3 requires screening on relevant suitability standards for live-in aides, including a determination of State lifetime registration as a sex offender. This cannot be determined without a criminal check. The regulations do not specifically address the issue

whether live-in aides may be screened in accordance with the provision which applies to public and assisted housing providers or market housing providers. Please check with your attorney regarding whether you may access CORI for live-in aides under the provisions which apply to housing providers, or as an alternative utilize the Open Access to CORI, which is available to all members of the general public.¹¹⁷

If a PCA isn't living with a tenant you may not have a basis for conducting a criminal check. Again, check with your attorney regarding the Open Access to CORI, which is available to all members of the general public. Disability discrimination law would prohibit you from singling out PCAs for such checks relative to other people employed by your residents who work at the site, such as child care providers.

6. IS A TENANT RESPONSIBLE FOR HER LIVE-IN AIDE/PCA'S BEHAVIOR IN THE BUILDING?

YES. If the tenant knows, or has reason to know, that her live-in aide/PCA is engaging in wrongdoing, the tenant has an obligation to do something about it. You should call such problems to the tenant's attention. If the tenant does not do anything about it, you can take action against the tenant by treating the inaction as a lease violation. In some instances, the PCA is victimizing the tenant and the tenant may welcome your help. If you believe a PCA is victimizing a tenant, you may call the Disabled Persons Protection Commission at 1-800-426-9009.

II. OCCUPANCY

Many housing managers do not know what to do if a tenant with a disability or whom they suspect has a disability violates the lease. This section provides guidance in those areas, including information on reasonable accommodations in such circumstances.

A. Behavior that Does and Does Not Violate the Lease

1. **WHAT SHOULD I DO IF A TENANT WHO HAS NOT VIOLATED THE LEASE APPEARS TO BE ACTING OUT OF THE ORDINARY FOR HER?**

Whether you take action when you believe a tenant is in need of assistance will generally depend on your relationship with the tenant and how serious the problem appears, and of course, your company's policies. If a manager has good cause to believe that there is a serious problem or emergency, the housing manager has the same right and obligation to summon assistance as any other citizen. Naturally, any apparent problem should be discussed with the tenant first, if possible. You may, for example, say to the person something like: "I've noticed lately that you have been (whatever you observed). Would you like me to help you with anything?" Remember, focus on what you observe, and not on your assumptions or conclusions regarding what is causing the person to behave out of the ordinary.

Any policy regarding intervention in non-lease violating behavior must be applied uniformly to all tenants. You cannot choose to intervene or not to intervene simply because a person has a disability. However, if a person's behavior gives you good cause to believe she needs assistance, you may intervene. You can offer assistance to anyone – disabled or not - - who clearly needs it. The point is that you must treat persons in similar situations in a similar manner.

2. **WHAT SHOULD I DO IF A TENANT'S DISABILITY-RELATED BEHAVIOR DOES NOT VIOLATE THE LEASE BUT IS ANNOYING TO SOME RESIDENTS?**

As a housing manager you must distinguish between behavior that is irritating (which is not a lease violation if it is mild or infrequent) and behavior that becomes a violation of the rights of other residents. In figuring out a solution to a situation involving a tenant's behavior that is merely mildly or occasionally irritating, bear in mind that residents do not have a right to be shielded from interacting with or seeing individuals with disabilities, even if their behavior is mildly or infrequently annoying. Also, remember that you must be consistent in how you approach a resident regarding annoying behavior.

How you approach the situation may depend on whether the unusual behavior can be controlled by the tenant with the disability. If the behavior is voluntary, you could explain to the person that her behavior is bothering other tenants and ask her if she could stop it. You should make sure the person understands whether or not you consider her behavior to be in violation of the lease.

If the behavior is involuntary as a result of a disability, such as Tourette's Syndrome, the focus needs to be on assisting the tenants who are bothered by the behavior in becoming more tolerant and accepting or at least understanding the behavior which bothers them. In cases where the behavior is involuntary, you should discuss with the tenant her willingness to allow you to provide information to other tenants for the purpose of allaying their concerns. The individual may be willing to educate other tenants herself. Alternatively, with the tenant's consent, you might consider bringing in an expert in the field. If the tenant with the disability is not willing to participate with you in allaying her neighbors' concerns or to allow you to do it on your own, you may not take steps regarding that individual, but you could do general education or offer general assurances that you thoroughly screen all residents for dangerous behavior.

3. WHAT CAN I DO IF A TENANT WITH A DISABILITY ENGAGES IN A MINOR LEASE VIOLATION?

The best practice is to offer all tenants consideration of a reasonable accommodation, if applicable. In other words, tell all tenants about reasonable accommodation and let those with disabilities decide whether

to ask for an accommodation. The tenant must cease the lease violations in order to avoid further lease enforcement actions.

a. Speak with the Tenant

Inform the tenant verbally or in writing, according to your company's policy, that she is engaging in lease-violating behavior and tell her that if she continues, you will send a lease violation notice. Offer to consider an accommodation and to speak to anyone she believes could help her with the situation if she raises the issue of accommodation during an eviction proceeding. A judge will usually require you to consider it before you can evict the tenant.¹¹⁸

You may ask if you, another staff person such as a resident service coordinator or someone else such as a service provider or family member can do anything to enable her to comply with the lease, but you may not ask the tenant anything about the nature or severity of her disability. Nor can you contact a third party service provider or family member to assist the tenant without the tenant's permission. Always check to see if you have permission to contact a third party in cases involving lease violations.¹¹⁹

b. Send a Lease Violation Notice

If it is your standard policy to send a lease violation notice immediately when someone engages in such behavior or when the behavior continues after you have first spoken to the tenant, or when the tenant engages in other minor lease violations, you must follow the same procedure with a tenant who has a disability.

If you send a lease violation notice, you should clearly state what the tenant is doing wrong. All lease violation notices should inform the individual of your obligation to provide reasonable accommodation if the negative tenancy related behavior is connected to a disability and tell the tenant how to request a reasonable accommodation if she needs it. While the statutes and regulations for non-MassHousing properties do not

specifically require notice of the right to reasonable accommodation to be included in a lease violation notice¹²⁰ the Massachusetts Supreme Judicial Court denied an eviction for lack of such efforts to try a reasonable accommodation.¹²¹

The lease violation notice may also include a statement that you have information about services available from a resident service coordinator, if any, or from local agencies or groups. Including such information in lease violation notices or eviction notices is evidence that the tenant was on notice as to reasonable accommodation and possible assistance.

NOTE: All written (or alternate format) communications with applicants and residents **MUST** contain a disability non-discrimination statement as described in Exhibit 2-3 of HUD 4350.3 Rev 1 in the Appendix.¹²² Other protected classes under federal or Massachusetts law include: race, color, religion, national origin, ancestry, sexual orientation, age, familial status and gender identity as of July 1, 2012.¹²³ Your locality may also have additional covered classes. Only disability is required to be mentioned, but you may wish to include all covered classes in one place. Also, remember that you may need to translate the lease violation notice into a different language for tenants whose primary language isn't English in accordance with Title VI of the Civil Rights Act and HUD's recent policy on Limited English Proficiency.¹²⁴

c. Speak with the Tenant's Service Provider If You Have Permission

You may also decide, either prior to sending a lease violation notice or some time thereafter, to ask to speak with the tenant's service provider, if she has one. If you ask to do so, make it clear to the tenant that you want to speak to the service provider in hope that you can remedy the lease violating behavior.

You may not contact a tenant's service provider without the tenant's permission to do so. If the tenant's service provider contacts you, you may relay information that is public, such as a police incident, etc. You may not speak with her about confidential information without written permission from the resident. The service provider of course may not talk to you

without a specific release. If you speak with the service provider, you should explain how the tenant is violating the lease and ask the provider to talk to the tenant about any reasonable accommodation and/or services that would resolve the problem. The April 1992, Massachusetts Department of Mental Health (DMH) Directive on “Mental Health Services to Consumers in Community Housing” instructs local DMH offices and vendors to respond to housing providers’ requests to work with DMH-eligible tenants on lease violation problems if the tenant is eligible for and wants such assistance.

You may, like any citizen, summon emergency or protective services without permission.

d. Reasonable Accommodation for a Minor Lease Violation

If the individual requests an accommodation as a means of ending the lease violation, you should consider her request and provide the accommodation if it will not result in a fundamental alteration of the program or an undue financial and administrative burden and is likely to address the lease problem. See Chapter 2, Section I.

4. WHAT CAN I DO IF A TENANT WITH A DISABILITY ENGAGES IN A MAJOR LEASE VIOLATION?

Approach the matter as you would with any tenant, including giving a notice of the right to reasonable accommodation. No matter what the person has done, you must consider reasonable accommodation, if requested.

- a. In considering a request, think carefully about whether it is reasonable to believe that the problem would not likely recur. If there is evidence the person would comply with the lease, make the accommodation. If, based on objective information, you do not believe the accommodation is likely to solve the lease violation, do not make the accommodation. **Consult your attorney before making a final decision** that the reasonable accommodation is likely to work. NOTE: the applicant, not the

housing manager, has the burden of documenting the disability and need for accommodation if not obvious as well as the likely effectiveness of the accommodation.

- b. If the person does not request an accommodation, you may ask to speak with the tenant's service provider if she has one. (See **subsection c** page 56.) If you speak with the resident's service provider, explain how the tenant is violating the lease, give information about the pending eviction and ask her to talk to the tenant regarding any reasonable accommodation that would enable the tenant to comply with the lease and/or alternative housing if the eviction seems likely. Document any conversations you have.

B. Reasonable Accommodation

Housing managers must make reasonable accommodations to enable a person with a disability to comply with the lease. **The provision of reasonable accommodation does not require the lowering or waiving of essential lease requirements.** Accommodations are not reasonable if they require a fundamental alteration in the nature of the program or impose undue financial and administrative burdens on a housing program. (See Chapter 2, Section I.)

1. IF A TENANT DID NOT DISCLOSE A DISABILITY WHEN SHE APPLIED FOR HOUSING, CAN SHE ASK FOR A REASONABLE ACCOMMODATION LATER?

YES. A person can request a reasonable accommodation for her disability at any point during the application process, while she is a tenant, in public or assisted housing and during eviction.¹²⁵

2. IF A TENANT ASKS FOR A REASONABLE ACCOMMODATION ONLY AFTER A DOG OR CAT IS DISCOVERED, MUST I ALLOW IT?

It may be frustrating to process such a request after the fact. However, if the person has a disability and needs the animal because of her disability, then the animal must be allowed, provided it is being kept in a manner that

meets local health codes, does not disturb others, or cause undue property damage.¹²⁶

3. WHAT MAY I ASK AN APPLICANT ABOUT HER DISABILITY IF SHE ASKS FOR A REASONABLE ACCOMMODATION?

If a person needs a reasonable accommodation, you may require her to provide reliable documentation (not medical records) that she has a disability and documentation of the need for the particular accommodation only if the disability and/or need are not obvious or known to you. You cannot ask the person any questions about the nature or severity of her disability. You may ask questions about the manifestations of her disability if specifically related to the requested accommodation.¹²⁷ (See sample forms in the appendix.)

4. IF A TENANT REQUESTS AN ACCOMMODATION, MAY I REQUIRE DOCUMENTATION THAT SHE HAS A DISABILITY AND THAT SHE NEEDS THE ACCOMMODATION?

A housing manager has a right to ask a tenant to document that she has a disability and needs the particular accommodation only if the disability and/or need are not obvious or known to the manager.¹²⁸ Such verification must be provided by someone with appropriate credentials and knowledge of the individual to make an informed judgment. Depending on the circumstance that person could be a medical or rehabilitation professional, a peer support group, or a non-medical service agency. (See sample form in the appendix.)

5. HOW MANY ACCOMMODATIONS MUST I PROVIDE A TENANT?

The law does not limit the number of accommodations you must provide to one person. In general, you will have to consider and provide any request for accommodation that does not fundamentally alter the nature of the housing program or result in an undue financial and administrative burden. (See Chapter 2, Section I.) However, if the disability and/or need are not obvious or known to you, you may require reliable documentation that the person needs the accommodation and/or that it is likely to be effective.

6. MAY I REQUIRE A TENANT TO ACCEPT A REASONABLE ACCOMMODATION?

NO. If you ask an applicant or tenant if she wants a reasonable accommodation or “assistance,” the person has the right to refuse it. However, you have the right to enforce lease requirements and may seek appropriate remedies up to and including eviction.

7. WHAT HAPPENS WHEN A TENANT REFUSES SERVICES BUT IS EXPERIENCING PROBLEMS JEOPARDIZING THE TENANCY?

If the tenant refuses services or another reasonable accommodation, but is engaging in lease-violating behavior, you should take the same action you would if the tenant did not have a disability. (See questions 3 and 4 in Chapter 1, Section II A.)

8. DO I HAVE TO ALLOW ANYONE WHO BRINGS A DOCTOR’S LETTER OR A PROFESSIONAL’S LETTER TO HAVE A COMPANION ANIMAL?

NO. If a person does not have a disability, you are not obligated to accommodate her needs. Companion animals are considered assistance animals in the context of housing.¹²⁹ You must allow the companion animal if the person provides documentation that she has a disability and needs the animal because it helps alleviate a symptom or effect of her disability provided it isn’t a fundamental alteration in your program or an undue financial and administrative burden.¹³⁰ If the disability and/or need are not obvious or known to you and you do not receive documentation of the disability and/or the need for the accommodation, you do not need to permit the companion animal. The companion animal must be kept in a manner that does not result in a violation of health and safety standards, interfere with the rights of others, or cause undue property damage. Owners can also require a resident with a disability who uses an assistance animal to be responsible for the care and maintenance of the animal, including the proper disposal of the assistance animal’s waste.¹³¹ An owner must not, however, apply standard “pet rules” to assistance animals, such as size, number of animals, type of animal and breed as these are all subject to consideration of reasonable accommodation. This means, for example, that if your site has a policy forbidding pit bulls, you must nevertheless make the accommodation to consider a particular pit

bull as a companion animal if requested as a companion animal by a person with a disability. You must allow the animal, provided the person can demonstrate the nexus between their disability and need for the companion animal as long as that particular pit bull meets the standards for animal behavior outlined above.¹³² Because the animal is a reasonable accommodation, you may not require a pet deposit. In Massachusetts, no housing provider may require a pet deposit in addition to the regular security deposit.¹³³

Also, federal and state-funded public and assisted housing for the elderly and disabled must permit residents to have common household pets as long as tenants comply with reasonable pet policies.¹³⁴

9. MUST I ALLOW VISITORS WITH SERVICE ANIMALS OR COMPANION ANIMALS TO BRING THEM ONTO THE PREMISES AND INTO THE BUILDING?

Yes. You may require that the animal be leashed and behave in a manner that doesn't interfere with anyone's quiet enjoyment or cause damage to the property.¹³⁵

10. HOW DO I DEAL WITH TENANTS WHO REQUEST THE SAME TREATMENT THAT THEY SEE ME GIVE SOMEONE ELSE AS A REASONABLE ACCOMMODATION?

This can be difficult because you want to ensure that you do not breach the confidentiality of the individual whom you did accommodate, but you also want to ensure that the other tenant understands her possible rights to an accommodation. Some people believe that the best approach is to explain the definition of disability and the reasonable accommodation process. Some advocates believe that this approach would breach the confidentiality of the individual whom you did accommodate. Another approach is to state that you aren't at liberty to discuss the other resident's situation, that the resident with whom you're speaking wouldn't like you to discuss her business with other tenants, but that in certain circumstances, you can provide a tenant with an accommodation and that if someone else would like you to consider providing the same accommodation or a different accommodation, she will have to tell you why she needs the accommodation and provide documentation of this need. If the disability

and/or need is obvious or known to you, you would have to provide the accommodation if it did not pose an undue burden. Consult your lawyer if you are in doubt about how to approach this situation.

11. WHAT IS A REASONABLE ACCOMMODATION FOR SOMEONE WITH A PSYCHIATRIC DISABILITY OR SUBSTANCE ABUSE PROBLEM WHO RELAPSES AND CAUSES SOMEONE BODILY HARM?

Any reasonable accommodation must be tailored to the specific person and the specific circumstances involved. A housing manager must always consider a reasonable accommodation if requested, but must be convinced based on objective factors that the plan will be effective. In the case of a tenant who causes bodily harm, a housing manager would need to have a high certainty about effectiveness because of liability in case of future occurrences.

12. IF A PERSON IS HOSPITALIZED FOR A PERIOD OF TIME, WHAT TYPE OF REASONABLE ACCOMMODATION MAY NEED TO BE MADE?

A tenant who has been hospitalized or who enters a residential treatment center may face loss of her subsidized housing for three reasons directly connected to the hospitalization: (a) because a housing manager determines that the person's unit is no longer her residence, (b) because the person is unable to pay the rent, or (c) the manager believes the unit has been abandoned.

If the tenant continues to pay her rent (directly or through a representative) and intends to return to the unit, the apartment is the person's residence. Owners of HUD-financed assisted housing MAY, BUT ARE NOT REQUIRED TO create house rules (which must be listed in the lease as an attachment and must be attached to the lease) regarding extended absences. House rules may define extended absence for longer than 180 continuous days for medical reasons and owners may allow for extenuating circumstances beyond whatever they establish as a policy.¹³⁶ If the owner has a house rule limiting the number of continuous days a person can be absent for medical reasons, extensions beyond the specified time frame would be considered a reasonable accommodation.

Thus to deny such a request an owner would have to show that such an

extension posed an undue financial and administrative burden (the rent of course would have to be paid in any absence) or a fundamental change in the nature of the program.¹³⁷ The latter might be a consideration if the absent tenant had no clear prognosis for coming home.

PHAs are required to terminate from the Section 8 program families who have been absent from the household for 180 consecutive days, provided no member of the household has been living in the unit during that time.¹³⁸ A PHA must have a policy on absenteeism, which may include hospitalizations, for the voucher program and has discretion in how to handle absences short of the 180 continuous days. PHAs may ask the person for a treatment provider letter indicating that she is likely to return and an estimated date. Housing authorities, although required to administer this rule, do have some flexibility. For example, a PHA could reinstate assistance for a family whose assistance was terminated under the 180-day rule.¹³⁹ PHAs may also request HUD to waive the 180-day rule. Although it is unlikely that HUD will do this, it might modify the 180-day rule in appropriate circumstances as a form of reasonable accommodation.

If it is not possible to arrange with the tenant for continued rent payments, contact her designated emergency contact person to see if a third party, such as a relative or service provider can pay the rent provided the resident has given you one.¹⁴⁰ If the person does not continue to pay her rent or if you cannot reach the tenant and she appears to have simply disappeared, you should contact your lawyer to determine how to proceed. **You should always contact your company or housing authority 504/ADA coordinator or lawyer immediately in all cases where significant adverse actions may involve reasonable accommodation or other fair housing issues.**

13. WHAT SHOULD I DO WITH THE PERSON'S POSSESSIONS IF I EVICT HER WHILE SHE IS IN THE HOSPITAL?

In Massachusetts, a person's possessions must be placed in storage for six months.¹⁴¹ Customarily, the housing manager pays for the first three months and the tenant pays the last three months. If the tenant does not claim her possessions, they are auctioned off. A service provider can often assist in making provision for the possessions.

Prior to removing someone's possessions you are required to provide forty-eight hours notice. The notice must contain specific information including a statement that the person's personal property will be placed in storage in a licensed public warehouse, specific contact information of the warehouse, and a statement that the warehouser can sell after six months any property not claimed.¹⁴²

14. UNDER WHAT CONDITIONS MAY I REJECT A REASONABLE ACCOMMODATION REQUEST?

You may reject the accommodation requested if: 1) the person does not meet the definition of disability; 2) there isn't a nexus between the applicant/resident's disability and the requested accommodation; 3) the request poses an undue financial and administrative burden, or 4) the request requires a fundamental change in the nature of the program. (See Chapter 2, Section I, page 106 for a discussion of these last two provisions.) The 4350.3 REV-1 and the Joint Memo of Understanding between HUD and the Justice Department on Reasonable Accommodation under the Fair Housing Act stipulates that if a provider refuses a requested accommodation because it is not reasonable, the provider should engage in an interactive dialogue with the requester to determine if there's an alternative accommodation that would address the person's access needs. The provider must grant such an alternative if it would meet the person's access needs. Remember if providing a requested accommodation would pose an undue financial and administrative burden, you must nonetheless take any other action that wouldn't result in such a burden.¹⁴³

Note: The HUD/DOJ Joint Statement on Reasonable Accommodation appears to conflict with HUD Handbook 4350.3 REV-1 and HUD's Frequently Asked Questions. The HUD/DOJ Joint Statement on Reasonable Accommodation states that if the requested accommodation is reasonable, but the housing provider nonetheless believes an alternative accommodation would be "equally effective" in removing the barrier to equal access, the provider may ask the applicant or resident whether the alternative will effectively remove the barrier. The HUD/DOJ Joint Statement on Reasonable Accommodation makes clear that the person with the disability makes the decision regarding effectiveness and is

not obliged to accept the housing provider's alternative if it will not meet her needs and her proposed accommodation is "reasonable".¹⁴⁴

On the other hand, Handbook 4350.3 REV-1 and the Frequently Asked Questions both indicate that alternative accommodations may only be discussed if the housing provider has found the proposed accommodation unreasonable. As such, one must provide the proposed accommodation unless doing so would pose a fundamental change in the program or an undue financial and administrative burden. One possible reason for the divergence is that the Joint Statement on Reasonable Accommodation addresses owner's obligations under the Fair Housing Act (not just those that receive federal dollars), whereas HUD Handbook 4350.3 and the Frequently Asked Questions consider Section 504 of the Rehabilitation Act which only applies to recipients of federal funds.¹⁴⁵ Support for this analysis is also found in the HUD/DOJ Statement on Physical Modifications. In an example provided, a tenant of subsidized housing who uses a wheelchair requested a roll-in shower. According to the statement the housing provider would be required to pay for the roll in shower unless it posed an undue financial or administrative burden or unless the housing provider could transfer the tenant to a unit with a roll-in shower. There was no discussion of the possibility of the housing provider engaging in any discussion of alternative, less costly methods of accommodating the resident.¹⁴⁶

15. WHAT SHOULD I DO IF I CANNOT AFFORD TO PROVIDE THE SAME REASONABLE ACCOMMODATION FOR SUBSEQUENT TENANTS WHO MAY REQUEST IT?

You cannot refuse to provide an accommodation to someone on the grounds that you would not be able to afford to provide the accommodation to subsequent tenants or that you are afraid of setting a precedent. You must provide the accommodation to a person if it does not result in an undue financial and administrative burden **at that time**. If a subsequent tenant asks you to provide the same accommodation, you must respond to the request on its merits at that time. If such an additional accommodation does cause an undue financial and administrative burden, then you do not need to provide the

accommodation, even though you have done it for others. You must, however, provide as much as you can afford and plan for how you are going to meet the tenant's needs as soon as possible.

C. Inter-Tenant Issues

1. **HOW SHOULD I HANDLE INTER-TENANT DISPUTES IF THE SITUATION INVOLVES A TENANT HARRASSING A TENANT WITH A DISABILITY BECAUSE SHE HAS A DISABILITY?**

Harassing fellow tenants is wrong and violates the lease. You therefore approach the situation as a lease violation or potential lease violation. Explain to the individual who is doing the harassing that the behavior violates the lease and that you will seek appropriate remedies up to and including eviction if the behavior continues. Also point out that such harassment is a civil rights violation and has legal consequences. Since this is a civil rights violation, it is best to confirm the conversation in writing to both the harassing tenant and the victim. NOTE: If your site receives federal dollars, all written (or alternate format) communications with applicants and residents MUST contain a disability non-discrimination statement as described in Exhibit 2-3 of HUD 4340.3 REV 1 in the Appendix. Also remember that Title VI of the Civil Rights Act may require that this communication be translated into another language if the resident has limited English proficiency.¹⁴⁷ Other covered classes under federal or Massachusetts law include: race, color, religion, national origin, ancestry, sexual orientation, gender identity, age, familial status, genetic information and public assistance.¹⁴⁸ Your locality may also have additional covered classes. Only disability is required to be mentioned, but you may wish to include all covered classes in one place. If you think it would help, you might also want to educate the tenant who is harassing her fellow tenant about that person's disability. Before doing so, you must clear it with the tenant with the disability so that you do not violate her confidentiality.

Also make sure the tenant who is being harassed knows that she has support and whom to contact if the problem persists, and that she may contact the police if she feels unsafe. You may offer to inform a service provider if the victim tenant has one. In addition, alert your security about

what has been going on so that security can prevent or respond to harassment. Document all these steps in writing.

2. WHAT SHOULD I DO WHEN A TENANT WITH A DISABILITY HARASSES ANOTHER TENANT?

As in question 1, harassing fellow tenants is wrong and violates the lease. Approach the situation as a lease violation or potential lease violation. The only difference is that you must consider reasonable accommodation if the offending conduct is as a result of a disability and the offending resident requests an accommodation. You should begin by talking with the individual who is doing the harassing. Explain that the behavior is not acceptable and violates the lease and that you will seek appropriate remedies up to and including eviction if the behavior continues. Inform her of your obligation to provide reasonable accommodation if the behavior is related to a disability. You must inform all residents of this because you must not assume that the person's negative behavior is because of her disability. That being said, if the tenant indicates that the behavior is related to her disability ask if there is some way to enable her to comply with the terms of the lease.¹⁴⁹ If the tenant with the disability has a service provider, you may also want to contact her if you have permission to do so. (See page 56, subsection c.)

Also make sure the tenant who is being harassed knows that she has support and whom to contact if the problem persists and that she may contact the police if she feels unsafe. In addition, alert your security about what has been going on. Document all these steps. You may wonder what you should do if the behavior becomes focused on one person. Some managers move the person who is being harassed if that person requests to move, but this is generally not a good solution since the person is likely to repeat the harassment with others.

Often in situations where the harassing behavior is related to the tenant's disability, the tenant who is harassing other tenants has delusional ideas about those tenants -- that they are spying on her, are drug dealers, prostitutes, terrorists, or are responsible for moving her belongings or otherwise causing trouble. Trying to dissuade the person of her delusion is not effective. Instead you should investigate any possibly true allegation, report the results to the resident and sympathize with his

or her worry about whatever the complaint is. You can ask if anyone has ever helped her in these situations before and suggest she get in touch with that person. You must also remind the person that it is a lease violation to interfere with the rights of other residents. If the harassment has reached the level of a lease violation, you should also send a written warning or do whatever you do for similar lease violations. **NOTE:** All written (or alternate format) communications with applicants and residents **MUST** contain a disability non-discrimination statement as described in Exhibit 2-3 of HUD 4350.3 REV.1 in the Appendix. Again, also remember that Title VI of the Civil Rights Act may require that this notice be translated into another language if the resident has limited English proficiency.¹³⁷ Other covered classes under federal or Massachusetts law include: race, color, religion, national origin, ancestry, sexual orientation, gender identity, age, familial status, genetic information, and public assistance. Your locality may also have additional covered classes. Only disability is required to be mentioned, but you may wish to include all covered classes in one place. Again, also remember that Title VI of the Civil Rights Act may require that this notice be translated into another language if the resident has limited English proficiency.¹⁵⁰

If a tenant continues to harass another tenant and there is no accommodation that can stop this behavior, you should treat this person as you would any other tenant. If necessary, seek appropriate remedies up to and including eviction.

3. WHAT IF A TENANT'S REQUESTED ACCOMMODATION INTERFERES WITH OTHER TENANTS' HEALTH, WELL-BEING, OR QUIET ENJOYMENT?

If the accommodation that a tenant with a disability requests interferes with another tenant's health, well-being or enjoyment, you should try to figure out if there is some other way to accommodate each of the tenant's needs – for example if a person needs to pace at all hours of the night as a result of her disability and the person's pacing disturbs her neighbor downstairs to the point that the neighbor cannot sleep. The neighbor has a right to sleep. You should consider thick carpeting or insulating the apartment floor of the person with the disability, putting in acoustic ceiling tiles in the neighbor's apartment or asking the person to walk around

outside if that is feasible. Ultimately, however, an accommodation for a tenant is not reasonable if it would interfere with another tenant's quiet enjoyment because this would be a lease violation.¹⁵¹

4. WHAT SHOULD I DO IF A TENANT'S IRRATIONAL FEAR ABOUT LIVING WITH PEOPLE WITH CERTAIN DISABILITIES CAUSES HER ACTUAL MENTAL OR PHYSICAL SYMPTOMS, SUCH AS HIGH BLOOD PRESSURE?

If a tenant's irrational fear about living with people with certain disabilities causes her actual mental or physical symptoms, you should ask yourself how you would act in a situation if a tenant experienced actual mental or physical symptoms because she lived next to a person of a particular race or national origin. You have no obligation to shield a tenant from seeing or interacting with any tenant, of whatever race or disability or other status, who is complying with the lease. You should reassure the resident that you conduct the same tenant screening of all applicants based on your tenant selection plan. You can try to educate the person who is uncomfortable with individuals with disabilities or other differences. However, you cannot take any action that would aid or abet the resident's discriminatory views. There are a number of organizations that do educational workshops about various types of disabilities for little or no money. MassHousing-assisted housing providers should contact the Community Services Department at MassHousing for suggestions. All Massachusetts housing providers may contact the Disability Law Center for suggestions.

III. EVICTIONS

Many housing managers are confused about when it is proper to evict a tenant with a disability. The questions below are designed to provide guidance on this subject. Before sending someone with a disability an eviction notice you should always ask yourself the following questions:

- a. Am I evicting this person or delaying evicting this person because she has a disability?
- b. Will reasonable accommodation enable this person to comply with the essential lease requirements?
- c. Is my goal to evict this person or to get her to accept services or some accommodation which will eliminate the lease violation?

1. WHAT IS A LEASE VIOLATION AND WHAT IS NOT?

In order to determine what a lease violation is you need to first examine the provisions in the lease. Although leases of different housing programs vary, the essential obligations for all leases are the same: timely rent payments, care of the premises, respect for the rights of others, avoiding criminal activity, and complying with other reasonable requirements. If a tenant does not adhere to these obligations she is in violation of the lease. A housing provider may only evict a tenant for the specific reasons that are contained in the lease.¹⁵²

2. WHAT IF THE TENANT DISCLOSES THAT SHE HAS A DISABILITY AND REQUESTS REASONABLE ACCOMMODATION DURING EVICTION PROCEEDINGS?

If a resident requests a reasonable accommodation any time during the eviction process, you must consider whether the individual has a disability, if there is a nexus between the person's disability and the negative tenancy related behavior and if yes, whether a reasonable accommodation will enable the tenant to comply with the terms of the lease.¹⁵³

If the disability and/or connection to the lease problem are not obvious or known to you, you have the right to ask the tenant to document her disability status, the connection between the disability and the lease

violation, and that the accommodation is likely to enable her to comply with the lease. You may request evidence that the person is willing to follow any proposed plan. Your individualized assessment of the situation may also consider the seriousness of the lease violation(s) and whether a repeat violation would seriously affect others or affect your legal responsibilities to provide decent, safe and sanitary housing¹⁵⁴If you believe that the accommodation proposed by the resident will result in a fundamental alteration of the program, an undue financial and administrative burden, or will not enable the tenant to comply with the terms of the lease, then proceed with the eviction after you have consulted your attorney. However, if you do this, be prepared to offer objective reasons for your decision. It is important that you keep good records of your analysis, and the factors you considered because a **determination whether an accommodation is reasonable is fact-specific and will be resolved on a case-by-case basis.**¹⁵⁵

For example, if the person has promised before to follow a treatment plan designed to eliminate lease violations, but has failed to do so and has provided no credible reason why she would now follow a plan, you would have reason to proceed with the eviction. Also, if in the past the tenant's health care provider or social worker has not provided accurate information about this or other tenants, you would have a basis for mistrusting the doctor or social worker and would have a right to ask for further documentation.

3. IF I KNOW THAT A TENANT'S DISABILITY RELATES TO THE LEASE-VIOLATING BEHAVIOR, IS IT LEGAL TO INITIATE A DISCUSSION OF A REASONABLE ACCOMMODATION?

You may notify any tenant that she is violating the lease and is entitled to consideration of a reasonable accommodation if the problem is a result of a disability. You should make clear that people with disabilities must meet the same lease standards as others, but can have help doing so. One approach is to simply ask her if there is anything that can be done to enable her to comply with the terms of the lease. By asking the resident this question you can't be accused of making any presumptions about her disability. If the person suggests a reasonable accommodation, you must consider it and determine if it would fundamentally alter the nature of the

program or result in an undue financial or administrative burden and whether it would be effective. Remember, she doesn't need to use the words reasonable accommodation. Rather, she just needs to make it clear that she's requesting an exception, change, or adjustment to a rule, policy, practice or service because of her disability in a manner that a reasonable person could understand to be such a request.

NOTE: All written (or alternate format) communications with applicants and residents **MUST** contain a disability non-discrimination statement as described in Exhibit 2-3 of HUD 4350.3 REV. 1 in the Appendix. Also remember that you may need to translate written material into another language for tenants with limited English proficiency in accordance with Title VI of the Civil Rights Act.¹⁵⁶ Other Covered classes under federal or Massachusetts law include: race, color, religion, national origin, ancestry, sexual orientation, gender identity, age, familial status, genetic information and public assistance.¹⁵⁷ Your locality may also have additional covered classes. Only disability is required to be mentioned, but you may wish to include all covered classes in one place.

4. IF I HAVE ALREADY MADE REASONABLE ACCOMMODATION AND THE TENANT CONTINUES THE LEASE-VIOLATING BEHAVIOR, CAN I MOVE TO EVICT HER?

YES. However, the reality is that even if you have provided a reasonable accommodation before you move for an eviction, the tenant or her lawyer may request a different reasonable accommodation during pre-court negotiations or when you get to court. The federal and state laws do not limit the number of times a provider has to consider reasonable accommodation proposed by the tenant. You need to consider the facts carefully and decide whether your realistic goal is eviction or lease compliance.

If your goal is to get the person to comply with the lease, you may decide to try another accommodation before you move to evict. Remember however, that a previous accommodation that did not work is not likely to work simply because you are trying again; there should be something **different** about another accommodation.

If the violation is serious or continuously repeated, you may decide to send an eviction notice and then reach a court agreement with the

tenant about reasonable accommodation and the consequences of the failure of the reasonable accommodation. Providing an accommodation isn't limited to dismissal of eviction with promise of changed behavior. You could present an agreed-upon plan to the judge as the condition on which you will hold off on the eviction proceedings. For example, you could craft a probationary period subject to periodic review and make it conditional on compliance with an appropriate treatment plan.

If the tenant then does not adhere to the plan and violates the lease, the eviction may be pursued or executed according to the agreement. If the eviction proceeding of a resident or family with a mental impairment will take place in Housing Court, you or your lawyer may wish to request that the court refer the person to the Tenancy Preservation Program, now available in all Housing Court jurisdictions.¹⁵⁸ **All such agreements should be made in consultation with your lawyer.**

If your goal is to evict the tenant, it may still be helpful to have considered another reasonable accommodation if requested. A judge will usually look more favorably on a housing provider who has made every effort to accommodate a person with a disability than someone who has not taken steps to resolve the problem. If the proposed reasonable accommodation or service plan seems unlikely to be effective in enabling the tenant to comply with the terms of the lease, document your reasons. The case law in Massachusetts and elsewhere indicates that some judges are reluctant to evict tenants unless considerable effort has been made to save the tenancy.¹⁵⁹ It is important to be able to demonstrate your efforts and to show that the accommodation has not been or will not be effective and why, in the specific circumstances of your case.

5. WHAT IF THE TENANT BELIEVES THAT I MADE THE WRONG OR INSUFFICIENT ACCOMMODATION?

If the tenant requests a different accommodation because she believes that you made the wrong or insufficient accommodation, you should decide whether to provide a different accommodation on the same basis as you made the initial accommodation.

6. WHAT DO I DO IF THE TENANT IS ENGAGING IN LEASE VIOLATIONS BUT SHE REFUSES TO DISCUSS THE PROBLEM OR POSSIBLE SOLUTIONS?

a. If the tenant has provided you written permission, either through HUD's Supplemental and Optional Contact Information for HUD-Assisted Housing Applicants Form (Form HUD-92006), or a comparable form permitting you to contact someone if she is violating her lease, you may do so. If the resident hasn't provided any written consent for you to contact someone if she is violating her lease and the resident has a service provider, you may ask if you can talk with her service provider. The Commissioner of the Department of Mental Health in Massachusetts has issued a Directive requiring the Department or vendor staff to work with the manager and tenant, if the tenant is eligible for and will accept DMH services, to resolve such lease violations if possible. The Department will talk to the tenant, but cannot make the tenant accept services or move. Nor can the Department share information with the manager – except to say that the Department has talked to the tenant – without the tenant's permission. A housing manager may not talk to a service provider other than emergency or protective services without the tenant's permission.

If the tenant does not want to discuss the matter, you may proceed as you would with any other tenant. If the lease violating behavior persists following a notice(s) of a lease violation, you may send the tenant an eviction notice if that is what you would do with a tenant without a disability under the same circumstances. If you do this, include in the eviction notice a statement regarding your obligation to consider any reasonable accommodation that would enable the person to comply with the lease.

Note: All written (or alternate format) communications with applicants and residents MUST contain a disability non-discrimination statement as described in Exhibit 2-3 of HUD 4350.3 REV. 1 in the Appendix. Also

remember that you may need to translate written material into another language for tenants with limited English proficiency in accordance with Title VI of the Civil Rights Act.¹⁶⁰ Other covered classes under federal or Massachusetts law include: race, color, religion, national origin, ancestry, sexual orientation, age, veterans' status, source of income, familial status, genetic information and receipt of public assistance. In addition, gender identity is a protected class as of July 1, 2012.¹⁶¹ Your locality may also have additional covered classes. Only disability is required to be mentioned, but you may wish to include all covered classes in one place.

- b. If you talk with the tenant's service provider, explain to that provider how the tenant is violating the lease, that you are willing to accommodate her but that she has to stop the behavior. Ask the provider to talk with the tenant and to see if she can get the tenant to comply with the terms of the lease. If the provider is unwilling to help or unable to get the tenant to change her behavior, then treat the tenant as you would any other tenant who was engaging in lease violating behavior. Send the tenant an eviction notice if that is what you would do with a tenant without a disability under the same circumstances. If you send the tenant an eviction notice, you should note your obligation to consider a reasonable accommodation that would enable the person to comply with the lease. Also, document any conversations you have with a service provider. See NOTE in a. above.
- c. If you send an eviction notice to a tenant, this may prompt her to reconsider your offer to consider a reasonable accommodation. Sometimes a tenant is unaware of the seriousness of the situation until the provider moves to evict her. If the tenant or her legal or service representative contacts you and requests an accommodation, you must provide it if it will not pose an undue financial and administrative burden or fundamental change in the program and you believe it will be effective. Consult your lawyer.

She can advise you on the best way to involve the court in enforcing an agreement.

In any of these instances, you may also want to ask the court to refer the case to Tenancy Preservation Program if the case is in Housing Court.

If the person's behavior is violent or dangerous, contact your lawyer immediately. She may recommend beginning an eviction immediately. If this is the case, you must **consider** a reasonable accommodation if requested during the eviction process, but you do not have to allow it unless there is strong reason to believe the conduct will not recur.¹⁶²

7. IF I TAKE NO FURTHER ACTION AFTER A 14-DAY OR 30-DAY NOTICE BECAUSE A TENANT AGREES TO SERVICES ADDRESSING THE LEASE VIOLATION, WHAT SHOULD I DO IF THE TENANT STARTS HAVING LEASE PROBLEMS AGAIN?

Consult your lawyer. Generally you would proceed with the eviction.¹⁶³ If the tenant agrees again to abide by the accommodation or a different accommodation, you would have a right to ask her to demonstrate why you should believe that she will keep the agreement this time. If you decide there is good cause to believe the tenant will keep the agreement this time, your lawyer can advise you on the best way to involve the court in enforcing such an agreement. For repeated or serious lease violations (health and safety issues, non-payment, significant threats to others, etc.), it is best to make agreements only through the court so that they can be enforced if necessary.

8. IF I TAKE NO FURTHER ACTION AFTER A 14-DAY OR 30-DAY NOTICE BECAUSE A TENANT AGREES TO SERVICES ADDRESSING THE LEASE VIOLATION, WHAT SHOULD I DO IF THE TENANT STOPS THE SERVICE PLAN, BUT DOES NOT VIOLATE THE LEASE?

You should contact your lawyer if you have not already done so. If the eviction proceeding has been dismissed or you have agreed not to proceed with the eviction, you cannot go into court on the tenant's

previous behavior. You would have to wait for the tenant to violate the lease again before moving for another eviction.

If you never actually got into court or if the prior eviction proceeding was dismissed “without prejudice,” and there has not been a long interval since the last lease violation, you might be able to reinstate the first eviction proceeding on this basis. If you do this, a judge might base her decision on the tenant’s behavior prior to your dropping the first eviction proceedings.

9. IF A TENANT WAS ADMITTED BECAUSE SHE HAD A SERVICE PLAN TO ADDRESS PRIOR BAD TENANCY RELATED BEHAVIOR AND SHE STOPS SERVICES AFTER SHE HAS BEEN ADMITTED, MAY I EVICT HER?

NO. You cannot evict a tenant for simply stopping her supportive services. However, once a person has been admitted to public or assisted housing, she can be evicted for failing to comply with the lease if that is what happens when the services stop. If the person was admitted on the basis that services related to lease compliance would be accepted, such information can be part of the eviction proceedings.

10. IF A TENANT VIOLATES THE LEASE, MAY I CONTACT A SERVICE PROVIDER?

You should do this only if you have the prior approval of the tenant or if the problem presents a danger to the person and/or others.¹⁶⁴

11. SHOULD I REFER A TENANT TO LEGAL SERVICES IF I START AN EVICTION?

This is up to you. If you want to help a tenant try to save her tenancy, then by all means refer the tenant to legal services or a service provider. Sometimes a lawyer may be able to convince a person to accept services in order to correct lease problems.

12. WHAT CAN I DO TO ENSURE THE WELL-BEING OF OTHER TENANTS IF A TENANT’S BEHAVIOR CONTINUES TO AFFECT OTHER TENANTS WHILE SHE IS BEING EVICTED?

Make sure that tenants know they should call the police if they feel threatened in any way. If there is potential violence or danger, you should also contact the police and any service provider to let them know about the situation. An arrest or civil commitment may be necessary in some circumstances. If there are criminal proceedings, you should contact the district attorney's office for that court and the victim witness program, if any. Depending on the circumstances, the judge in the criminal proceedings can order the person to stay away from certain people or even from the site as part of bail or probation. In addition, you can increase security if you think it is necessary and ask all housing management and maintenance staff to watch the situation closely.

Chapter 2: FEDERAL DISABILITY DISCRIMINATION LAWS

This chapter provides an overview of the federal disability discrimination statutes, which apply to public and assisted housing. We begin with a section on terms that relate to fair housing. More experienced readers may skip to page 82.

A. What Makes Up the Law

The “law” is made up of several kinds of rules: statutes, regulations, executive orders, constitutions, administrative directive systems and judicial and administrative decisions (case law).

1. STATUTES

A statute is law in the way most people think about laws, a written collection of rules passed by a legislature. Both Congress and state legislatures pass statutes which may be referred to by the name of the law (the Fair Housing Act, The Americans with Disabilities Act, Rehabilitation Act, etc.), the number of the law (P.L. 100-430 [Public Law 100-430]), or the code citation from the complete collection of state or federal laws (29 U.S.C. [United States Code] §794 [Section 794], M.G.L. [Massachusetts General Laws] Chapter 151B §5, etc.).

2. REGULATIONS

Regulations are the rules government agencies (for example, the Department of Housing and Urban Development, the Department of Health and Human Services, etc.) follow to administer the laws passed as statutes. Regulations provide structure, detailed procedures, and specific rules to carry out the requirements of more general statutory provisions. Although regulations are related to the statutes they implement, they are also rules, which must be followed. “Regs” set standards of behavior and often provide the procedures for filing a complaint, making an appeal, and

requesting a review. Like statutes, they are referred to by code citations (28 C.F.R. [Code of Federal Regulations] 35, 521 C.M.R. [Code of Massachusetts Regulations] 5.11).

3. EXECUTIVE ORDERS

Another kind of law is an executive order issued by the President or the governor of a state. Executive orders set requirements for behavior, operations or policy for agencies of the government. For example, Massachusetts Executive Order 246 prohibits an agency or department of the Commonwealth of Massachusetts from discriminating in housing and other areas because of a person's disability. (NOTE: Even though Massachusetts is called a "Commonwealth," it is treated like any other state.)

4. CONSTITUTIONS

State and federal constitutions are another kind of law prohibiting various types of discrimination. The United States Constitution is the highest form of law and all other kinds of law must conform to it. The state constitution is the highest state law and all state laws must conform. State constitutions may have higher standards than the federal constitution but not lower. The U.S. Constitution sets requirements for the equal protection of citizens and due process (fair procedure), but is not often relied upon in disability discrimination cases. Many states, such as Massachusetts, have a constitutional amendment forbidding discrimination on the basis of disability in housing.

5. DIRECTIVE SYSTEMS

Government agencies that administer programs have various methods of communicating rules that program participants must, should, and can follow. For example, HUD's directive system for assisted housing providers and public housing providers consists of notices and handbooks. HUD issues notices to its staff and program participants (owners and their agents, which are often referred to as O/A's) to inform them of a change in policy or rule or to reaffirm an existing rule. Handbooks are an important source for understanding what HUD believes its regulations and the statutes that cover the housing program mean. The handbooks contain

mandatory rules, advisory guidance, and statements of what owners are permitted to do. If a dispute about housing policy ends up in court, judges often give a lot of weight to what HUD says in its handbooks. **HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs** is a “rule book” on the occupancy, policies, and procedures governing many subsidized, multifamily housing programs. It includes many obligations relating to issues contained in this handbook. It is commonly referred to as HUD Handbook 4350.3 or simply the 4350.3. Public Housing also has an occupancy handbook which PHA’s rely on for guidance. It is titled **Public Housing Occupancy Handbook**.¹⁶⁵ HUD has also issued a number of notices on non-discrimination and accessibility for Persons with Disabilities over the years which apply to public and assisted housing providers, some of which have expired.¹⁶⁶ Please note that expired notices are sometimes referenced in the newer notices or replaced by a newer notice. Unless a notice is specifically replaced or contrary guidance has been issued, it may be helpful for housing providers to read an expired notice to get an understanding as to HUD’s thinking on a topic. In other words, just because a notice hasn’t been reissued doesn’t mean HUD has changed its position on a matter. If you have a question regarding the validity of the information contained in an expired notice contact HUD directly and ask for clarification.

6. **CASE LAW**

All sources of disability discrimination laws and protections are interpreted through written decisions by courts. The written decisions are called “case law.” In some cases, it may be an administrative agency “making” case law. For example, HUD is an administrative agency responsible for enforcement of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA) in cases involving housing and the Fair Housing Act. Another example of an administrative agency is the Massachusetts Commission Against Discrimination (MCAD), which enforces Massachusetts’ disability discrimination laws.

If a person or housing agency disagrees with the decision a court or administrative agency makes, she can often appeal it. A higher court, an “appellate” court, will make a “ruling” (a decision) either rejecting or

upholding the earlier decision. These rulings are law too and they provide more specific guidance about the meaning and scope of statutory, regulatory or constitutional provisions. For example, the Federal District Court may rule on the meaning of Section 504 of the Rehabilitation Act. On appeal the Court of Appeals may reverse the lower court's interpretation. Then the parties can ask the highest court, the United States Supreme Court, to hear the case. If it takes the case, the Supreme Court will uphold or reverse the Court of Appeals' decision. In cases where a higher court disagrees with a lower court's decision of a case, the higher court decision "controls" (wins) and the decision of the lower court may be disregarded. If a decision is not appealed, the lower court decision stands. All these court decisions add to our understanding of the meaning of laws.

State laws can also be enforced at different levels of courts. The names of these courts differ from state to state. In Massachusetts they are the District or Superior Court, the Court of Appeals, and the Supreme Judicial Court (SJC). If a decision is made at a local or appellate level in either the state or federal courts, that decision governs only in the geographic region covered by that court. Often lawyers from one region will use a case from another region as support for their point of view. Sometimes a judge in another region will give great weight to the first region's decision; other times, the judge will make a different decision. When the regional decisions differ, sooner or later someone will appeal to the highest court. If the highest court takes the case, its decision will then govern everywhere.

B. What Happens If More Than One Law Applies?

In many cases, you may have obligations under several different state and federal laws and HUD's Directive System. For example, in respect to disability discrimination, a housing provider in Massachusetts would have to comply with both state and federal laws that apply to them. These include the Massachusetts disability discrimination law, (The Massachusetts Housing Bill of Rights for People with Disabilities, commonly referred to as Chapter 151B), Article 114 of the Massachusetts Constitution, the Massachusetts Equal Rights Law (M.G.L.

Chapter 93 §103), Section 504 of the Rehabilitation Act, The Fair Housing Act and Title II of the ADA. Some of these laws require a housing provider to do more than others or provide protection for individuals who are not covered in other statutes or provide different remedies than others.

Where more than one law applies in a particular case, you are obligated to comply with all of the laws. Federal laws do not normally supersede state laws if the state law provides greater protection.

C. How Is The Law Enforced By An Individual?¹⁶⁷

If a person with a disability believes she has been discriminated against on the basis of her disability, she may choose to try to resolve the matter in an informal manner by talking with you or writing you a letter, contacting the PHA or management company 504/ADA coordinator, using the housing authority's/assisted housing provider's grievance procedure, or by contacting the applicable state agency such as MassHousing. She also has the option of filing a complaint with an administrative agency like HUD or in our state, the Massachusetts Commission Against Discrimination (MCAD).

A person can also go straight to HUD or MCAD if she does not want to use or does not know about an informal process. A complaint is typically an allegation of who discriminated, the circumstances of the alleged discrimination, and other data. The person who alleges that she was discriminated against, called a "complainant," must file within a period specified in the applicable statute or regulation (this is called a statute of limitations). If a complaint is filed with an agency, the agency must address the complaint, usually also within a specified period. Once the agency has investigated the complaint and made a decision, the losing side may seek a rehearing or file an appeal with the agency. There are usually provisions for either side to take a matter to court at various times during the administrative process.

Once either side decides to go to court, the person bringing the complaint is called the "plaintiff" and the person or entity sued is called the "defendant." When a case goes to court, unless the case is settled or disposed of at an earlier stage, a trial will occur. At trial, both sides have an opportunity to present their side of the case, have witnesses testify and cross-examine the other side's witnesses, and introduce relevant documents. At the end of the trial, the judge or jury will reach a decision in favor of one side or the other. If the individual or

agency claiming discrimination prevails, the judge or jury has several choices of remedies: (1) money damages, and in some cases, punitive damages (damages designed to punish the defendant); and/or (2) "equitable relief," (relief in the form of personal decrees, not money damages) for example, an order to give someone the next available apartment, or (3) a declaratory judgment, which is a statement by a court about rights or obligations. If the defendant wins, the case ends unless the plaintiff appeals.

If the plaintiff or defendant appeals the lower court's decision, the appellate court will decide whether the trial court decided the legal issues correctly and will either uphold, modify or reverse the lower court's decision. It may send the case back to the trial court with instructions about what to do next. If a party wishes to appeal the decision of the appellate court, she may often be permitted to do so. If the higher appellate court refuses to hear the case, the lower court's decision stands.

D. What Federal Laws Require Fair Housing For Individuals with Disabilities?

In recent years there has been a dramatic expansion of the legal rights of persons with disabilities to have equal access to housing and housing programs and thus the legal obligations of housing providers have also expanded. The following is a brief description of each of the federal laws that forbid discrimination against individuals with disabilities and require removal of architectural and administrative barriers in all public and assisted housing.

Central to disability discrimination statutes is housing providers' obligation to make reasonable adjustments to their rules, policies, practices and services and methods of communication and to make, or permit to be made, structural modifications for people with disabilities to enable them to have an equal opportunity to use and enjoy their unit or a common area.¹⁶⁸ This obligation occurs throughout the occupancy cycle (in admissions, residency, and lease termination), and housing providers are prohibited from refusing to rent to persons with disabilities, or placing conditions on their residency, because a person may require reasonable accommodations. Reasonable accommodations and the limits on it are discussed in Section I, beginning on page 106.

The chart beginning on page 90 lays out the applicable federal laws. It includes the types of practices which are prohibited and required by each law, the type of housing covered, each law's definition of a person with a disability, and whether individuals with psychiatric disabilities, those who have substance abuse, or a history of a substance abuse problem, and individuals who are HIV positive or have AIDS are covered. An explanation of the information contained in the chart follows. A chart showing how each law is enforced and what remedies are available is on page 118.

1. ARCHITECTURAL BARRIERS ACT (ABA) OF 1968

This law does not technically prohibit discrimination against persons with disabilities. Rather it mandates that buildings intended for public use (except for privately owned residential facilities and residential structures on military bases) in which people with physical disabilities may live and work comply with federal accessibility standards in certain circumstances. The federal standards apply to such buildings when they are:

- constructed or altered by or on behalf of the United States, or
- leased in whole or in part by the United States, or
- financed in whole or in part by the United States, or
- Subject to such standards for design, construction or alteration under authority of the law authorizing the grant or loan.

The ABA requires federal agencies, including HUD, to prescribe standards for design, construction or alteration of buildings. HUD has issued regulations defining such accessibility standards for publicly owned residential structures, including enforcement policies and procedures.¹⁶⁹

2. SECTION 504 OF THE REHABILITATION ACT OF 1973:

Until passage of the federal Fair Housing Amendments Act in 1988, Section 504 of the Rehabilitation Act of 1973 was the most important and most frequently cited law prohibiting discrimination against people with disabilities in public and assisted housing. Many of the more recent laws have taken their wording directly from Section 504 of the Rehabilitation Act or have modified its language slightly or adopted similar language. Judicial interpretations of the Fair Housing Act as amended in 1988 and the Americans with Disabilities Act take into account the substantial body

of law interpreting the Rehabilitation Act. Therefore, it is important to understand the earlier act. Section 504 of the Rehabilitation Act reads:

No otherwise qualified individual with a disability in the United States,shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.¹⁷⁰

The language of Section 504 is further defined and implemented through federal regulations. Each federal agency that provides funding for a program or activity is supposed to develop regulations under Section 504 which apply to programs and organizations receiving financial assistance from that particular agency. For example, HUD has developed Section 504 regulations which apply to housing programs that receive federal financial assistance and the Department of Agriculture has developed Section 504 regulations which apply to the Rural Development Administration.¹⁷¹ Most local and state housing authorities receive federal financial assistance and therefore fall under the jurisdiction of Section 504.¹⁷² Privately operated, federally subsidized housing entities are also covered by Section 504. Examples of housing programs to which HUD provides financial assistance are (a) low-income housing (such as public housing, Section 8, 221 and 236 programs); (b) housing for people who have disabilities (such as Section 202 and Section 811); and (c) programs for the homeless (such as McKinney programs) and HOPE VI.¹⁷³ A private owner whose only receipt of federal monies is a Section 8 voucher is not considered a recipient of federal financial assistance. Also, tax credits alone are not considered federal financial assistance. However, a site that has project based federal financial assistance and tax credits would be covered by Section 504. In addition, the agency that allocates the tax credits may choose to require the taxpayer receiving the credits to comply with Section 504 as a condition of receipt of the tax credits.

Section 504 also contains physical access requirements for new construction, substantial rehabilitation, and other alterations as well as

rules regarding the operation of an existing housing program or activity receiving federal financial assistance.¹⁷⁴

Housing providers must use UFAS or a design standard that provides equal or greater access.¹⁷⁵

3. THE FAIR HOUSING ACT:

In 1988, Title VIII of the Federal Civil Rights Act of 1968 was amended to forbid discrimination on the basis of disability, regardless of receipt of federal funds.¹⁷⁶ The practices which are prohibited under Section 504 are generally discriminatory and unlawful under the Fair Housing Act (FHA) and its regulations. This law is more comprehensive and explicit in its protections than Section 504 of the Rehabilitation Act and its regulations. The FHAA prohibits all forms of discrimination in the sale or rental of a dwelling because of a person's disability. Discrimination is unlawful with respect to the terms, conditions, or privileges of any sale or rental of a dwelling or in the provision of any services or facilities in connection with the dwelling.¹⁷⁷ The FHAA is implemented through HUD regulations.¹⁷⁸

The FHAA and its regulations prohibit discrimination based on the disability of the renter or buyer or the disability of the person residing in or intending to reside in that dwelling, such as a child, or of any person associated with the buyer or renter or other person intending to reside or residing in the dwelling.¹⁷⁹ For example, a housing manager could not refuse to rent to an individual with AIDS or an individual whose child has AIDS or an individual whose guests have AIDS simply because of the diagnosis.

The FHAA contains physical access requirements for new construction only. HUD currently recognizes a number of safe harbors for compliance with the Fair Housing Act's Design and Construction Requirements.¹⁸⁰

4. TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA):

The ADA, which was signed into law in 1990, is one of the most important disability laws. Title II of the ADA and the regulations that implement that title extend the protections of Section 504 to all activities of "public entities" – state and local governments – regardless of whether they receive federal financial assistance.¹⁸¹ Public housing authorities and state housing finance agencies are considered public entities for the purpose of

Title II. Likewise, Title II will apply to an assisted housing program if a city or state finance agency provides significant financing for the development.¹⁸²

The requirements of program access under Title II are virtually identical to those under Section 504. Public entities were supposed to be in compliance with the program accessibility requirements of Title II within 60 days after the effective date of the final regulations (January 26, 1992). Where structural changes had to be undertaken, they were supposed to be completed within three years of the effective date (by January 25, 1995).¹⁸³ The ADA does not contain requirements specific to housing, such as how many units must be accessible. Although the Title II regulations do not specify a requisite number of units, the regulations' requirement of program access indicate that at least one unit would need to be made accessible, and possibly more, depending on the provider's waiting list.

Like the Fair Housing Act, the ADA prohibits discrimination because of the renter's disability or the renter's association with a person with a disability residing in or intending to reside in that dwelling, such as a child, or because of any person associated with the buyer or renter or other person intending to reside or residing in that dwelling.¹⁸⁴

Like Section 504, Title II contains physical access requirements for new construction and rehabilitation as well the requirement for program access regardless of planned alterations.

5. TITLE III OF THE AMERICANS WITH DISABILITIES ACT (ADA):

Title III of the ADA prohibits discrimination against people with disabilities by any privately owned public accommodation if the operation affects interstate commerce. Places of public accommodation include the following types of businesses: places of lodging such as an inn or motel (except owner-occupied lodging houses with five or fewer rooms); restaurants, bars; movie theaters, theaters, concert halls, stadiums; auditoriums, lecture halls, convention centers; sales or retail establishments (e.g., hardware store, clothing store, shopping center, etc.), any service establishments (e.g., dry-cleaners, banks, rental offices, professional offices of health care providers, insurance offices, etc.); public transportation terminals; parks, zoos, amusement parks; schools at all levels; day care centers, senior citizen centers, homeless shelters, food

banks, adoption agencies, other social service establishments; gymnasiums, health spas, bowling allies, golf courses, or other places of exercise or recreation.¹⁸⁵

This section of the ADA applies to owners or operators of public accommodations, as well as owners of property or buildings in which public accommodations are located. It does not apply to strictly residential facilities, but covers places of public accommodation within residential facilities, such as a rental office, or a community room, pool, or other amenity that is rented out to the general public.¹⁸⁶ Also, if a private owner operates a residential facility with a significant enough level of social services, the facility may be considered a place of public accommodation under Title III.¹⁸⁷

In addition, if an apartment complex contains commercial space in addition to its residential units, the owner of the building, as well as the owners or operators of the public accommodations, must comply with the ADA. Landlords and tenants can decide between themselves who is responsible for complying with the ADA by lease or other contract.¹⁸⁸

The obligations contained in Title III are less onerous than Title II of the ADA and Section 504 and Title III does not generally have an impact on the provision of reasonable accommodation or physical modifications for applicants and tenants with disabilities living in public or assisted housing. Title III may have a significant impact on a property if it is not public or assisted and contains a site office and/or public amenities that are rented.

Title III requires a public accommodation to remove all physical barriers in every building, when “readily achievable”, to provide auxiliary aids if it will not fundamentally alter the program or result in an undue burden (significant difficulty and expense), and to make changes in rules, policies, and procedures if it will not fundamentally alter the nature of the program.¹⁸⁹ Title III contains specific requirements regarding new construction and altering an existing facility.¹⁹⁰

Federal Laws Prohibiting Discrimination in Housing Against People With Disabilities

Law	Types of Practices Which Are Prohibited or Required	Housing Covered	Definition of a Person With a Disability (Handicap)
Rehabilitation Act §504 29 U.S.C. §794 (federal) Note: Remember 504 uses “otherwise qualified” person....”	<ol style="list-style-type: none"> 1. Cannot discriminate, exclude or deny benefits solely because of disability. 2. Must provide reasonable changes, adaptations or modifications to a policy, program, service (includes physical changes). 3. Program must be readily accessible to and usable by individuals with disabilities. 	Any housing that receives federal funds, including public housing authorities and assisted housing providers	A person who: <ol style="list-style-type: none"> 1. has a physical or mental impairment which substantially limits a major life activity, such as walking, thinking, speaking, hearing, learning, breathing¹⁹¹ 2. a record or history of an impairment which limits a major life activity, even if the person no longer has the disability or if the disability no longer limits a major life activity or 3. is regarded as having an impairment that limits a major life activity.
Fair Housing Amendments Act 42 U.S.C. §3601 et. seq. (federal)	<ol style="list-style-type: none"> 1. Cannot discriminate. 2. Provide Reasonable Accommodation in rules, policies, practices and services; 3. Allow tenant to make reasonable physical modifications. 	All housing except owner-occupied 4-, 3-, or 2-family housing	Same as Above
Title II of the Americans with Disabilities Act (ADA) (federal)	Same as Section 504	Housing provided by state and local governments and their entities, including public housing authorities	Same as Above

Are People With Psychiatric Disabilities Covered?	Is Illegal Drug Use Covered?		Are People Who Have Alcoholism Covered?	Are People with AIDS or Who Are HIV+ Covered?
	Current Use	History of Use		
<p>YES,</p> <ol style="list-style-type: none"> 1. if the psychiatric disability substantially limits a major life activity; or 2. if a housing provider thinks the person's psychiatric disability or perceived psychiatric disability limits a major life activity; or 3. if the person has a history of psychiatric disability which limits a major life activity and the housing provider discriminates against the person because of the history. 	<p>NO,</p> <p>if the illegal use of controlled substances occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem</p>	<p>YES,</p> <ol style="list-style-type: none"> 1. if recovered from addiction, i.e., successfully completed rehab program and not using, or 2. if participating in treatment program or self-help group and not currently using 	<p>YES</p>	<p>YES</p>
<p>YES Same as Above</p>	<p>NO</p>	<p>YES Same as Above</p>	<p>YES</p>	<p>YES</p>
<p>YES Same as Above</p>	<p>NO</p>	<p>YES Same as Above</p>	<p>YES</p>	<p>YES</p>

E. Housing Laws Covered and Exempted Under Federal Laws

Unlike Section 504 of the Rehabilitation Act which covers only federally-assisted housing and Title II of the ADA, which covers housing substantially financed or owned by public entities, the Fair Housing Act covers virtually every kind of housing, regardless of whether public funds are involved or if it is financed or owned by a public entity. In general, this law's prohibition against discrimination on the basis of disability applies to: (1) publicly assisted housing; (2) any building, structure or portion thereof which is used, occupied, designed or intended for occupancy as a residence by one or more families; and (3) any vacant land which is offered for sale or lease for the construction thereof. There are certain exceptions but they do not apply to public or assisted rental housing.

The Fair Housing Act exempts from coverage owner-occupied housing with four or fewer units.¹⁹² It should be noted that Massachusetts has a stricter standard, owner occupied two or less units.¹⁹³ The Fair Housing Act also exempts an owner if she is renting or selling her single family house provided that the owner: (a) does not have an interest in more than three such houses; (b) has not sold a house within the previous 24 months; (c) does not use a real estate agent or broker to sell or rent the house; and (d) does not use a discriminatory advertisement. This exemption applies only to the owner and not to any co-op or condominium association.¹⁹⁴

F. Individuals Covered By Federal Laws

The federal laws discussed in this chapter all protect individuals with disabilities from discrimination. They all define a "handicapped person" or a "person with a disability" for purposes of non-discrimination in essentially the same way.¹⁹⁵ A person who:

- a. has a physical or mental impairment that substantially limits one or more major life activities;
- b. has a record of such impairment; or
- c. is regarded as having such impairment.¹⁹⁶

The physical or mental impairment can include practically any condition, disease, illness, disfigurement or disorder (e.g., alcoholism, AIDS, emotional disorder, drug addiction, mental retardation, cerebral palsy, cancer, deafness, or

HIV infection) so long as the impairment substantially limits one or more major life activity. As a result of an amendment to the Americans with Disabilities Act, corrective measures other than “ordinary glasses or contact lenses” are not to be considered when determining whether a person meets the ADA definition of “substantially impaired in one or more major life activities”. Nor is there any evidence that a different standard is used in relation to any other federal law discussed herein. Massachusetts state law likewise requires the determination of whether the person is substantially impaired in a major life activity to be made without regard for corrective devices.¹⁹⁷ “Major life activity” includes caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning and working. This list is not exhaustive; other life activities can also be “major.”¹⁹⁸

For non-discrimination purposes, a person does not in fact have to have a mental or physical impairment in order to fall within these statutes’ definition of a “person with a disability.” A person is “disabled” if others regard or treat her as if she has a physical or mental impairment which substantially limits a major life activity. For example, if a housing provider believes that an applicant for housing has a mental impairment and refuses to rent to her because of this perception, the applicant would be considered “person with a disability” under the law for non-discrimination (but not reasonable accommodations purposes) even if she does not have a psychiatric disability.

A person also fits within the definition if she has a history or record of a disability even if she no longer has the disability or if her disability no longer limits a major life activity. For example, if an applicant to housing has a history of addiction to illegal drugs, she is protected by law if the landlord refuses to rent to her because of that history absent any evidence that she is a current user of illegal drugs.¹⁹⁹ A chart summarizing this definition appears on page 96. Remember, this definition of disability/handicap is used for purposes of determining who is protected by civil rights laws. It is not the definition of disability or handicap used to determine who is eligible for public or assisted housing.

1. INDIVIDUALS WHO CURRENTLY USE ILLEGAL DRUGS

Current illegal drug users, including individuals who are using medical marijuana, are excluded from the definition of “individual with a disability” under Section 504 of the Rehabilitation Act,²⁰⁰ and the ADA,²⁰¹ when the

housing provider acts on the basis of the illegal drug use. This includes the use of medical marijuana.²⁰² The Fair Housing Act's exclusion regarding illegal drug use is different. The term "handicap" under the Fair Housing Act does not categorically exclude people who currently illegally use a controlled substance. Rather, it prohibits someone from claiming that illegal drug use is in and of itself a basis for claiming that he or she has a disability under the act. A person who currently illegally uses a controlled substance may meet the civil rights definition of disability if she has another disability that satisfies the three-prong test.²⁰³

2. INDIVIDUALS WHO HAVE A HISTORY OF ILLEGAL DRUG USE

The federal laws distinguish between individuals who currently use illegal drugs and individuals who are not currently using illegal drugs but have a history of addiction to illegal drugs. Individuals who are not currently using illegal drugs but have a history of addiction to illegal drugs are protected. The difficulty comes in determining who is a current user for the purpose of these laws. The laws do make clear that an individual is protected if she is not currently using illegal drugs and has a) successfully completed a rehabilitation program;²⁰⁴ b) has otherwise been rehabilitated successfully;²⁰⁵ or c) is participating in a treatment program²⁰⁶ or self-help group.²⁰⁷

The ADA's Title II and Title III regulations define current illegal use of drugs as "illegal use of drugs that occurred recently enough to justify a reasonable person's belief that a person's drug use is current or that continuing use is a real and ongoing problem."²⁰⁸ In discussing the meaning of "current use" the ADA's Conference Report states the following:

The provision is not intended to be limited to persons who use drugs on the day of, or, within a matter of days or weeks before, the action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that the person's use is current.²⁰⁹

Although neither 504 nor the FHAA or the applicable regulations define current use of a controlled substance, the legislative history of the ADA indicates that the phrase “current illegal use of drugs” has the same meaning under §504 as well.²¹⁰ While it is not entirely clear how a court would define “current,” it is clear that a set time applied to everyone should be avoided. Any decision must be a reasonable judgment based on the facts related to the individual applicant.

INDIVIDUAL WITH HANDICAPS/DISABILITIES

Any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.

Physical or Mental Impairment		Major Life Activities	Record of Impairment	Regard as Impaired
Physiological disorder, contagious disease, cosmetic disfigurement or anatomical loss in one or more system:	Mental or psychological disorder including:	Major life activities include:	The individual has:	The individual has:
Neurological Musculoskeletal Respiratory Cardiovascular Reproductive Digestive Genitourinary Hemic Lymphatic Skin Endocrine	Mental retardation Organic brain syndrome Emotional or mental illness Specific learning disabilities	Self care Manual tasks Walking Seeing Hearing Speaking Breathing Learning Working	A history of impairment or A record of having been misclassified as having an impairment	An impairment not limiting major life activity, but treated as limiting by the agency: An impairment limiting major life activity only as a result of attitudes or No impairment, but treated by the agency as having one.

Note: This module came from a HUD training on Section 504

3. INDIVIDUALS WITH ALCOHOLISM

Section 504 of the Rehabilitation Act doesn't contain any exception regarding individuals with alcoholism outside the employment context. However, the HUD regulations have not been brought into compliance with the statute.²¹¹ In accordance with the statute, an applicant with alcoholism (like any other applicant with a disability) must be "otherwise qualified" with or without reasonable accommodations.

The definition in the Fair Housing Act and Title II of the ADA do not exclude individuals with alcoholism whose use of such substance prevents them from meeting tenancy requirements. The Fair Housing Act instead provides a general exclusion elsewhere in the law for any individual whose tenancy would pose a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others, provided a reasonable accommodation could not eliminate the threat.²¹² The preamble to the ADA's Title II regulations states that where questions of safety are concerned a person who poses a significant risk to others will not be "qualified" if reasonable accommodations will not eliminate that risk.²¹³

4. INDIVIDUALS WITH A PSYCHIATRIC DISABILITY

Each law explicitly includes individuals with psychiatric disabilities, as well as individuals who have a history of a psychiatric disability or are perceived as having a psychiatric disability.²¹⁴ A person with a psychiatric disability, like any other person, should only be excluded if that individual's behavior would be included in the exceptions below and a reasonable accommodation could not cure the problem.

5. INDIVIDUALS WITH HIV OR AIDS

Federal law protects people who are HIV positive or who have AIDS and individuals who are perceived as having HIV or AIDS.²¹⁵ A diagnosis of HIV or AIDS by itself poses no "direct threat to others."²¹⁶ Housing maintenance workers should already be observing universal safety precautions whenever disposing of trash. Taking universal precautions means that situations where you **could** come into contact with blood and certain body fluids should be treated as if they are known to contain HIV, Hepatitis B, Hepatitis C or other blood borne infections. Don't pick and choose what precautions you use based on who the resident is, or what you think you know about him/her. To do otherwise is

discriminatory if the level of precautions is based on protected status. Focus instead on the task you are being asked to do and whether that task has potential risks. A person with HIV or AIDS, like any other person, should only be excluded if that individual's behavior would be included in the exceptions below and a reasonable accommodation could not solve the problem.

6. INDIVIDUALS WITH OTHER DISABILITIES

Persons with all other disabilities that meet the three-pronged definition are also covered by these laws, unless they are excluded as described below.

G. Exclusions under Federal Law

Section 504 of the Rehabilitation Act, Title II of the ADA and the Fair Housing Act explicitly limit who is covered by the law by utilizing exclusions that do not specifically apply to individuals with any one disability. These exclusions apply when: (1) the individual's tenancy poses a direct threat to others;²¹⁷ or (2) the individual's tenancy would result in "substantial physical damage to the property of others";²¹⁸ and (3) the person is not "otherwise qualified" for housing.²¹⁹

1. DIRECT THREAT TO OTHERS

The legislative history of the Fair Housing Act and the preamble to the ADA's Title II regulations indicate that the "direct threat" exception was not intended to create or permit a presumption that individuals with disabilities pose a greater threat to the health or safety of others than do individuals without disabilities.²²⁰ According to HUD and the Department of Justice, the finding of a direct threat "...must rely on an individualized assessment that is based on reliable objective evidence (e.g. current conduct or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that the injury will actually occur; and whether there are any reasonable accommodations that will eliminate the direct threat."²²¹ For example, a housing provider could not simply point to the applicant's history of physical or psychiatric disability or disability or treatment for that illness or disability as a threat.²²² A housing provider can only reject a person on the basis of a history of actions that pose such a threat provided there had not been some changes in the meantime which make it likely that such actions would not recur.²²³ These

principles likewise apply in the context of a tenant with a disability who engages in negative tenancy related behavior. As in the application context, if the tenant requests an accommodation and can demonstrate that there is a nexus between her disability and the need for the accommodation, a manager must consider whether an accommodation will enable the tenant to be lease compliant.²²⁴

Also, Congress intended that the “direct threat” language contained in the Fair Housing Act be interpreted consistently with a Supreme Court decision²²⁵ which involved Section 504, taking into account reasonable accommodation.²²⁶ In accordance with the Supreme Court’s decision, if a reasonable accommodation could eliminate or sufficiently reduce the risk to health or safety, the housing entity covered by the Act would be required to provide the accommodation.²²⁷

2. SUBSTANTIAL PHYSICAL DAMAGE TO PREMISES

The Fair Housing Act allows an owner or landlord to reject a person’s tenancy if it would result in “substantial physical damage to the property of others.” The legislative history makes it clear, however, that this provision was intended to be read in conjunction with other provisions in the Act providing access for persons in wheelchairs.²²⁸ Accordingly, a housing provider would not be allowed to exclude a person in a wheelchair because of normal wear and tear to a dwelling unit that might be expected from a wheelchair, such as the nicking of doorframes or walls. Other threats to property, documented in past history, would be a reason to reject someone, provided there had been no changes which make it likely that such actions would not recur and there was no reasonable accommodation requested by the applicant/tenant which could reduce damage to a reasonable level.

In contrast to the Fair Housing Act, the ADA does not specifically exclude from protection people whose tenancy would constitute a direct threat to property; nor does Section 504. However, neither law requires a housing provider to ignore reasonable suitability standards and to accept applicants who have a record of destroying property. Thus, it is likely that the courts and the relevant enforcement agencies would find that people with disabilities who caused prior significant damage may be rejected as tenants if there is no reasonable accommodation or other change that makes future damage unlikely.

3. OTHERWISE QUALIFIED

Section 504 and the ADA, unlike the Fair Housing Act and Massachusetts State Law, use the term “qualified” person with disabilities to limit the coverage of the statute to individuals who meet the essential eligibility requirements for participation in or receipt of benefits from that program or activity. In the housing context, this includes programmatic eligibility requirements such as income, disclosure of social security numbers and citizenship, and suitability requirements related to the ability to comply with the terms of the lease. A housing provider may find, for example, that a person with a disability is not otherwise qualified because she is not income eligible, or because of a criminal conviction. However, in such an instance the housing provider upon request would have to provide the person with a disability a reasonable accommodation throughout the application process if necessary to determine her income eligibility. The case law has traditionally made it clear that a determination of whether someone is “otherwise qualified” must be made in the context of whether a reasonable accommodation will permit the individual to realize the benefits of the housing program, including meeting the terms of the lease. Reasonable accommodations will not change whether an applicant meets eligibility requirements, but may apply in situations involving suitability. The concept of reasonable accommodation is discussed Section I.

H. Federal Disability Discrimination Statutes: Prohibited and Required Practices

Section 504 provides a general prohibition against any discrimination, exclusion or denial of benefits as a result of a person’s disability. HUD’s Section 504 regulations provide a more detailed explanation of the kinds of activities that will be considered discriminatory under Section 504. A “qualified” individual with a disability (1) must be afforded an opportunity equal to that afforded to others;²²⁹ and/or (2) must be provided housing or benefits which are as effective as those afforded to others;²³⁰ and/or (3) may not be provided different or separate housing or benefits unless necessary to provide the person with a disability with housing or benefits that are as effective as those provided to others.²³¹

These regulations make clear that it is not necessary to produce an “identical” result. Instead, the law affords persons with disabilities an “equal opportunity to obtain the

same result, to gain the same benefit or to reach the same level of achievement.²³² Moreover, the regulations make clear that a recipient must administer a program or activity which receives federal funds in the most integrated setting appropriate to the needs of qualified individuals with disabilities.²³³ The following module summarizes Section 504's prohibitions against discrimination.

PROHIBITIONS AGAINST DISCRIMINATION *Note: this chart came from a HUD training on Section 504*

GUARANTEE	PROHIBITION
Opportunity to participate	Denying a qualified individual with handicaps the opportunity to participate in, or benefit from, the housing, aid, benefit or services.
Equality of benefits	Failing to afford a qualified individual with handicaps the opportunity for equal participation and benefit.
Equality of opportunity	Failing to provide a qualified individual with handicaps a program or service that affords equal opportunity to benefit.
No unnecessary differences or separateness	Providing different or separate housing, aid, benefit, or services on the basis of handicap when there is no necessity to do so.
No assistance to entities that discriminate	Providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in any aspect of a federally assisted activity.
Opportunity to serve on boards	Denying a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards.
No denial of right to a dwelling	Denying a dwelling to an otherwise qualified buyer or renter because of a handicap that he or she or another prospective tenant may have.
No discriminatory limitation of benefits	Limiting in any other manner a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity afforded to others.
Most integrated setting appropriate	Providing programs or services to qualified individuals with handicaps in settings that are unnecessarily separate or segregated.

As mentioned earlier, Title II of the ADA and its regulations extend the protections of Section 504 to all activities of “public entities” - state and local governmental entities - regardless of whether or not they receive federal financial assistance.²³⁴ Therefore, the practices prohibited under Section 504 are also prohibited under Title II of the ADA. Many of the prohibited practices under Section 504 and the ADA are also discriminatory and unlawful under the Fair Housing Act. These laws prohibit all forms of discrimination in the sale or rental of a dwelling to the otherwise qualified buyer or renter because of that person’s disability.²³⁵ Discrimination is unlawful with respect to the terms, conditions, or privileges of any sale or rental of a dwelling or in the provision of any service of facilities in connection with the dwelling.²³⁶

1. EXAMPLES OF DISCRIMINATORY PRACTICES PROHIBITED BY FEDERAL LAW

Principle:

- a. A housing provider cannot deny an eligible applicant with a disability the opportunity to apply for housing or lease housing because of the applicant’s disability.²³⁷

Forbidden Practices

(1) A housing provider with a policy that an applicant must come to the housing office to fill out an application refuses to accommodate an applicant who is unable to enter the inaccessible office because she uses a wheelchair or because she is unable to leave her home because of her disability.

(2) A housing provider refuses to rent to someone with a mental disability or a person she believes has a mental disability because the provider is afraid of how other tenants will react or that the individual will be unable to live independently without any evidence that there is a history of not being able to meet the lease requirements.

(3) A housing provider refuses to rent to someone solely because the person has AIDS or is thought to have AIDS.

(4) A housing provider refuses to allow a single person with a disability and medical documentation of the need for a live-in personal care attendant to have a two-bedroom apartment.

Principle:

b. A housing provider cannot subject a person with a disability to segregation. (Programs designed for people with certain service needs or set up by statute to serve a particular group of people are not considered illegally segregated programs.)

Forbidden Practices

(1) A housing provider places all people with a disability or type of disability, such as psychiatric disability, on one floor of an apartment building or in one section of a building because she wants to shield other tenants from having to see or interact with individuals with a disability or type of disability.

NOTE: A housing provider may house persons with a particular service need in one place if such clustering is necessary to deliver the services and participating in the program is voluntary, for example, a floor with special security for individuals with dementia. Some of HUD's programs are specifically designed for this purpose and Title VI of the Housing and Community Development Act of 1992 allows local housing authorities to have "designated-elderly" and "designated-disabled" buildings or sections of buildings in certain circumstances.²³⁸

Principle:

c. A housing provider cannot treat people with a disability or a type of disability differently compared to other applicants in determining eligibility or other requirements for admission.

Forbidden Practices

(1) A housing provider requires everyone with a psychiatric disability to sign a lease addendum or agreement stating that they will receive mental health services as a prerequisite to admission.

(2) A housing provider refuses to rent to anyone who has a history of alcoholism or addiction to illegal drugs (and are not currently using illegal drugs) unless she attends a program for individuals with substance abuse problems.

(3) A housing provider requires anyone with a psychiatric disability to provide documentation that she is capable of living independently.

(4) A housing provider requires anyone with AIDS to provide medical documentation that she does not pose a health risk to other people.

(5) A housing provider considers the last ten years of rental history for someone with a psychiatric disability but only the last three years of rental history for others.

(6) A housing provider requires persons who use motorized wheelchairs to obtain liability insurance.²³⁹

Principle:

d. A housing provider cannot deny a person with a disability access to the same level of service or amenities because of the person's disability.

Forbidden Practices

(1) A housing provider fails to provide a sign language interpreter for a rent increase meeting or other general meetings with tenants.

(2) A housing provider who provides transportation services to the local shopping market has a van that is not wheelchair accessible.²⁴⁰

2. PRACTICES THAT HAVE THE EFFECT OF EXCLUDING PEOPLE WITH DISABILITIES MAY BE ILLEGAL

Under Section 504 and the ADA, discriminatory intent is not necessary to establish discrimination.²⁴¹ These laws prohibit policies or practices which may be neutral on their face but have a disparate impact or unequal effect on individuals with disabilities or a particular disability. HUD published a [regulation](#) formalizing the use of the disparate impact theory to bring claims of housing discrimination under the Fair Housing Act. Also, the Supreme Court has affirmed that “disparate impact claims are cognizable under the Fair Housing Act.”²⁴² Consult with your lawyer immediately if someone claims that a policy of yours has a disparate impact.

I. Housing Providers Are Required to Make Adjustments for People with Disabilities to Enable Them to Have an Equal Opportunity to Enjoy Housing.

As mentioned earlier, central to all of the disability discrimination statutes is a housing provider’s obligation to make reasonable adjustments to their rules, policies, practices, procedures,²⁴³ methods of communication²⁴⁴, and to make (or permit the person with the disability to make) structural modifications for people with disabilities to enable them to have an equal opportunity to use and enjoy their unit or a common area. This obligation applies throughout the occupancy cycle (in admissions, residency and lease termination) and does have limits. A provider need not make changes that result in a fundamental alteration of the nature of the housing program²⁴⁵ or result in an undue financial and administrative hardship.²⁴⁶

It is highly unlikely that a physical modification would result in a fundamental alteration of the nature of a housing program. A modification of a unit or common area is unlikely to change the nature of the program (providing decent, safe and sanitary affordable housing), but rather enables individuals to participate in the program. A fundamental alteration usually applies in situations involving requests for an adjustment in a rule, policy or procedure. Therefore, the concept of fundamental alteration is discussed below under the subsection titled “Rules, Policies and Procedures.” Financial considerations generally come up in the context of requests for physical modifications. Therefore, the concept of undue administrative and financial burdens is discussed in the section titled “Physical Modifications.”

1. RULES, POLICIES, AND PROCEDURES

All of the disability discrimination statutes require housing providers to make reasonable adjustments to their rules, policies, practices, and procedures for people with disabilities if necessary to enable them to have an equal opportunity to use and enjoy the facilities or programs.²⁴⁷ The federal Fair Housing Act's regulations call this reasonable accommodation and Title II of the ADA's regulations call this reasonable modification.²⁴⁸ Section 504's regulations do not use the term reasonable accommodation outside the employment context but they require a recipient of federal funds to make reasonable changes in its housing policies and practices to ensure that these policies and practices do not discriminate on the basis of handicap.²⁴⁹

2. EXAMPLES OF REASONABLE MODIFICATIONS OF RULES, POLICIES, AND PROCEDURES

The parameters of what is a "reasonable accommodation" or "reasonable modification" are unclear because neither the federal statutes nor their applicable regulations specifically define these terms. However, the two basic elements are (a) an accommodation makes it possible for a person with a disability to have full access to the housing program and (b) it is something that is "reasonable" for a housing provider to do. The following examples illustrate what is intended:

- a. Allowing a tenant with a psychiatric disability who has a documented psychological dependence on a pet to keep the animal in his or her apartment in spite of a no-pet rule, as long as the animal's behavior does not violate the lease;
- b. Permitting rent payments to be mailed in rather than delivered in person if someone's mobility disability prevents her from leaving her apartment;
- c. An assisted housing provider with financing directly from HUD taking into account "mitigating circumstances" for an applicant with a bad tenancy record which is caused by her disability. This means the provider should consider a person's disability-related

reasons for a bad tenancy record and the changes in the person's life that would indicate that the problem would not recur. (MassHousing-financed providers are required to do this anyway. See "Mitigating Circumstances" section of Chapter 1 for discussion of public housing and mitigating circumstances);

- d. Allowing a tenant whose newly manifested mental disability causes her to damage her apartment to seek mental health assistance to alleviate the destructive conduct and giving the assistance a reasonable time to work, rather than completing eviction proceedings.

3. FUNDAMENTAL ALTERATION OF THE HOUSING PROGRAM

Not all changes in rules, policies, and procedures would be considered "reasonable" even if the housing provider could afford it.²⁵⁰ Under federal law a modification would not be considered reasonable if it would result in a fundamental alteration in the nature of the housing program.²⁵¹ A determination of whether an accommodation/adjustment would result in a fundamental alteration of a program is not a cost-based analysis. Rather, it requires a determination of the primary purpose of the program and the practical components necessary to achieve this purpose. The regulations for the funding source, landlord/tenant law, and the lease can provide information about what is "fundamental" in any given housing program although not everything in the regulations or lease would necessarily be fundamental.

4. EXAMPLES OF FUNDAMENTAL ALTERATIONS OF HOUSING PROGRAMS (CHANGES THAT WOULD NOT BE REQUIRED)

- a. A request that a housing provider provide personal care services to enable the tenant to live independently if the provider does not normally provide personal care services;
- b. Allowing a tenant with a psychiatric disability who has a documented psychological dependence on a pet to keep the animal in her apartment in spite of a no-pet rule if she fails to properly toilet the pet and no arrangements for the care of the pet can be made;

c. Admitting a person with alcoholism who has a bad tenancy history (engaging in violent behavior, not paying rent....), which the applicant attributes to her having an alcohol abuse problem if there has not been a change in her use of alcohol.

5. PHYSICAL MODIFICATIONS OF PREMISES

Public and assisted housing providers who receive federal money or are covered by Title II of the ADA are required to pay for physical modifications.²⁵² These federal laws adopt the concept of “program accessibility,” which means that when viewed in its entirety, the program should be “readily accessible to and usable by individuals with handicaps.”²⁵³ Among the possible methods for complying with this requirement are reassignment of services to accessible buildings, assignment of aids to assist users of the program, provision of housing or related services at alternative sites, alteration of existing facilities and construction of new facilities, or any other method that results in making the housing program or activities readily accessible to and usable by individuals with handicaps.

6. EXAMPLES OF PHYSICAL MODIFICATIONS

Examples of physical modifications that would usually be required include the following:

- a. installing an automatic water faucet shut-off for people who cannot remember to turn off the water;
- b. installing a flashing alarm system for someone who cannot hear the audible alarm;
- c. carpeting or installing acoustic tiles to reduce noise made by a person whose disability causes her to make a lot of noise; or
- d. disconnecting a stove and installing a microwave for a person unable to operate a stove safely.

7. FACTORS TO CONSIDER IN DETERMINING IF A PHYSICAL MODIFICATION WOULD POSE AN UNDUE ADMINISTRATIVE AND FINANCIAL BURDEN

Not all physical modifications are “reasonable.” A housing provider does not have to provide a physical modification if it would cause an undue hardship. This is a cost-based test. Because a housing provider’s financial situation is not static, a determination must be done each time a request for a physical modification is made. Factors to be considered in determining whether an accommodation would impose an undue hardship include the nature of the accommodation, the cost of the accommodation, the size of the owner’s overall housing business, including the number of units, the type of units, budget and assets, and the ability of the provider to recoup the costs.²⁵⁴ The 4350.3 REV-1 emphasizes the case by case determination. HUD field offices will consider a request to use the residual receipts account to pay for alternatives under 504. The Handbook also stipulates that the replacement reserve account is only supposed to be used for replacing existing items and that if HUD approval is received for any other purpose, such as 504 alterations, then the account must be replaced through property rental income **generally** within one year.²⁵⁵ In the event that a physical modification is not reasonable because of the cost to the housing program, a provider must allow the modification if the tenant paid some or all of the cost so that the modification would no longer cause such an undue burden.

8. REASONABLE ACCOMMODATION REQUEST PROCEDURES

To facilitate providing reasonable accommodation to individuals with disabilities into your daily operating routines, you need a standardized reasonable accommodation procedure by which applicants or residents with disabilities may request an accommodation.²⁵⁶ The written procedure should include the following: (a) the points in the occupancy cycle where information on the availability of reasonable accommodation will be provided;²⁵⁷ (b) how an applicant or tenant may request an accommodation; (c) the decision-making process (including a determination of undue financial and administrative burdens or fundamental alterations); (d) the confidentiality of any medical information obtained; (e) the time period(s) for a decision, and if applicable,

implementation of the accommodation;²⁵⁸ (f) the manner in which you will respond to the applicant/tenant's request for reasonable accommodation; and (g) an applicant/tenant's right to a review of an unfavorable decision concerning an accommodation or the choice of accommodation.²⁵⁹ (See sample policy in appendix.) Any decision regarding reasonable accommodation should be well documented in writing. If you reach an agreement on a reasonable accommodation, you should include in the written summary the terms, conditions, performance expectations for everyone involved and if relevant, a schedule for implementing the accommodation.

Any reasonable accommodation procedure must be available in alternate formats for individuals with all types of disabilities. Written materials should be in plain language and communication with the applicant or resident must be provided in an accessible format. Also remember to comply with all requirements regarding applicants and residents with Limited English Proficiency (LEP).

In some instance, having a 504/ADA coordinator is required.²⁶⁰ It is good practice for every company or housing authority to designate someone to oversee reasonable accommodations requests to ensure consistent compliance even if not required.

The purpose of having reasonable accommodations procedures is to ensure prompt and consistent responses to requests. However, according to HUD and the Department of Justice "...a housing provider must give appropriate consideration to reasonable accommodations requests even if the requester makes the request orally and does not use the providers' preferred forms or procedures..."²⁶¹ A housing provider **may not require** an applicant or resident to use the provider's reasonable accommodation forms if the person has supplied all the relevant information in some other way. In addition, the person does not have to use the "magic words," "reasonable accommodation." The requester only has to make the request in a manner that a "reasonable person" would understand to be a request for an exception, change, or adjustment to a rule, policy, practice, or service because of a disability.²⁶² Any request for a change due to a disability should be considered a reasonable accommodations request.

9. THE OBLIGATION TO PROVIDE AUXILIARY AIDS

Housing providers also have an obligation to provide and pay for “auxiliary aids” for applicants and tenants with impaired sensory, manual or speaking skill where needed to facilitate effective communication with these individuals.²⁶³ Examples are Braille materials and taped materials for individuals who are blind and telephone devices (TDD’s) or sign language interpreters for individuals who are deaf. Auxiliary aids do not include such personal items as hearing aids, magnifying eyeglasses, etc.

10. THE OBLIGATION TO ASSIST SECTION 8 VOUCHER HOLDERS WITH DISABILITIES IN FINDING AN ACCESSIBLE APARTMENT

Section 504 requires public housing authorities administering a Section 8 housing voucher program to make sure notice of the program reaches people with disabilities and to help people with disabilities who have a Section 8 voucher find accessible housing.²⁶⁴ This duty includes searching for accessible units when requested by an individual and recruiting landlords with the desired type of housing and accessible units.²⁶⁵ The duty to assist a person with a disability may also include help in removing barriers for everyone whose disability makes the search more difficult, such as assisting in the lease negotiation process with the owner if requested.

Public housing authorities are also required to provide extensions for vouchers when necessary due to problems of locating accessible units²⁶⁶ and must offer higher rents to encourage the provision of accessible units.²⁶⁷

J. Architectural Accessibility

Under Massachusetts and federal laws, newly constructed buildings that are open to the general public as well as buildings undergoing major renovations or reconstruction must be built in conformity with detailed regulations requiring accessible features, including doorways wide enough to accommodate wheelchairs, wheel chair ramps, handicapped parking spaces in public lots, drinking fountains, public toilets and pay telephones that are usable by people in wheelchairs, Braille or raised numbers in elevators, and numerous other features.

We have not fully discussed the obligations of public and assisted housing providers regarding design and construction of new housing or if the property is making substantial or other alterations.

Please note, however, that Massachusetts has different, and in some instances more stringent, standards of accessibility in its access code. Massachusetts housing providers need to consult the AAB code before starting alterations (see Section E, page 92). Note also that MassHousing and AAB have a memorandum of understanding that has slightly different alteration standards than the AAB.

If you have technical assistance questions regarding the Federal Fair Housing Act's design and construction requirements you may contact Fair Housing Accessibility FIRST. Their website is www.fairhousingfirst.org and their toll free design and construction resource center phone number is (888)341-7781. (Voice/TTY). If you have questions about ADA compliance, you may also contact the New England ADA Technical Assistance Center, which is a project of the Institute for Human Centered Design. The website is <http://adaptiveenvironments.org/neada/site/home>. The center's telephone number is 1-800-949-4232 (Voice/TTY - in New England Only) or 1-617-695-1225 (Voice/TTY). If you have questions about accessibility issues in Massachusetts you may contact the Massachusetts Office on Disability. Their website is <http://www.mass.gov/mod/default.html> and their telephone number is (617) 727-7440 or toll free [800] 322-2020 (V/TTY).

K. Self-Evaluation, Needs Assessment, Transition Plans, and Program Accessibility

1. SELF-EVALUATION UNDER 504

Section 504 of the Rehabilitation Act requires both public and assisted housing providers who are recipients of federal funds to complete a written self-evaluation of their administrative operations and policies to determine what operational or administrative changes must be made to remove procedural barriers to individuals with disabilities.²⁶⁸ HUD's notice to PHAs on compliance with §504, the ADA, Architectural Barriers Act of 1968, and

the Fair Housing Act, encourages PHAs to update their self-evaluations at least annually.²⁶⁹ The 4350.3 REV-1 also encourages updating of this document.²⁷⁰ The module following on page 115 summarizes the §504 self-evaluation.

2. NEEDS ASSESSMENT

PHAs were required under Section 504 to assess the needs of current tenants and applicants on the waiting list for accessible units and the extent to which such needs had not been met through various means available. If the information on availability of units had not been adequately communicated so that the number of individuals with disabilities was not fairly representative of the number of such persons in the area, the PHAs assessment had to include the needs of people with disabilities in the area. If the needs assessment indicated that physical alterations were necessary, a transition plan was required. PHAs are encouraged to conduct a needs assessment annually at least.²⁷¹

SELF-EVALUATION (504) *Note: This module came from a HUD training on Section 504*
(Title II has virtually identical requirements)

GENERAL REQUIREMENTS

A self-evaluation must be completed by July 10, 1989.

In preparation of the self-evaluation, the recipient must consult with individuals with handicaps or organizations representing them.

Recipients with 15 or more employees must keep on file for at least three years:

- A list of interested persons consulted;
- A description of areas examined and any problems identified; and
- A description of modifications made and remedial steps taken.

ELEMENTS

Evaluation of current policies and practices relative to the 504 regulations.

Modification of any policies and practices that do not meet the 504 requirements.

Corrective action to remedy any discrimination found.

AREAS TO BE EVALUATED

Buildings or facilities for physical accessibility

Program outreach and communication

Eligibility and admission criteria and practice

Distribution and occupancy policy and practice

Percentage of accessible units

Employment (including pre-employment)

Complaint processing procedures

3. TRANSITION PLAN UNDER §504

A transition plan is mandatory under §504 if structural changes to facilities are needed to achieve program accessibility. In accordance with Section 504, transition plans were to be developed on or before January 11, 1989, for assisted-providers and July 11, 1990, for public housing authorities with the assistance of individuals with handicaps or organizations representing them; A copy of the plan must be made available for public inspection. PHAs are encouraged to update the plan annually at least.²⁷² The chart below summarizes the general requirements and contents of the transition plan.²⁷³

THE TRANSITION PLAN (504)

GENERAL REQUIREMENTS

A transition plan is mandatory if structural changes to facilities are needed to achieve program accessibility.

The plan must be developed with the assistance of individuals with disabilities and organizations representing them.

A copy of the plan must be made available for public inspection.

CONTENTS OF THE PLAN

Identification of the physical obstacles that limit accessibility

Detailed list of changes and costs for each.

Schedule for each step of the process, including year-by-year milestones if more than one year is required.

Name of the official responsible for implementation of the plan.

Names of persons or groups who assisted with the plan.

Note: This chart is adapted from a HUD training on Section 504, but is also applicable to Title II of the ADA.

4. PROGRAM ACCESSIBILITY REQUIREMENTS — ADA

Public entities must comply with the program accessibility requirements of Title II within sixty (60) days after the effective date of the final regulations (January 26, 1992), except that where structural changes are undertaken to achieve program accessibility they must be made up to the point of posing an undue financial and administrative burden within three years of the effective date.²⁷⁴ In accordance with Title II of the ADA, public entities employing 50 or more persons which must undertake structural changes to achieve program accessibility were supposed to publish a transition plan setting forth the steps necessary to achieve the structural changes by July 26, 1992.²⁷⁵ Interested people, including people with disabilities and organizations representing individuals with disabilities must be provided with an opportunity to participate in the development of transition plans. Transition plans at a minimum must identify physical obstacles in the public entity's facilities that limit the accessibility, specify the schedule for taking the steps necessary to achieve compliance, and specify the individual responsible for implementation of the plan. A copy of the transition plan must be available for public inspection. A public entity that has already issued a transition plan under Section 504 must develop a new plan only for those policies and practices not included in the original plan.

L. Enforcement of Federal Laws

Enforcement is carried out in a variety of ways depending upon the particular law involved and how a person chooses to proceed. Before reading the specific enforcement mechanisms for each law, it is important that you be familiar with a few common terms and procedures.

First, all claims of discrimination must be filed within specified deadlines, often referred to as "statutes of limitations." The deadline for filing administrative complaints (complaints with agencies that enforce the laws) is often quite short (for example, 180 days to file an administrative complaint under Section 504 and Title II of the ADA).

There are a variety of agencies that enforce disability discrimination laws. The Fair Housing Act, Section 504 (if the money comes from HUD), and Title II of the ADA (if it involves housing) are enforced by HUD. The Massachusetts Commission Against Discrimination (MCAD) also enforces the federal Fair Housing Act.

Most local housing authorities and state-financed housing have informal procedures to resolve fair housing complaints. A housing provider that receives federal money and

has at least 15 employees company or housing authority wide is required to have a grievance procedure for tenants.²⁷⁶ Likewise, such providers are required to have a 504 coordinator who can help resolve a problem.²⁷⁷ Housing providers should seek advice and assistance if an applicant or tenant raises an issue. Resolving problems informally avoids having to go through the HUD process and litigation.

1. ENFORCEMENT MECHANISMS AND REMEDIES AVAILABLE UNDER FEDERAL DISABILITY DISCRIMINATION STATUTES

The chart below summarizes the enforcement mechanisms and remedies available under each disability discrimination statute. Note that the specific remedy given would depend on the particular case.

Federal Enforcement Mechanisms and Possible Remedies

Law	Enforcement	Possible Remedies
Rehabilitation Act §504, 29 U.S.C. 794 (federal)	Administrative complaint with federal agency providing the financial assistance within 180 days of discrimination and/or federal court within 3 years	<ol style="list-style-type: none"> 1. Loss of funds, 2. Monetary damages, 3. Injunctive and other equitable relief, 4. Costs and attorney's fees.
Fair Housing Amendments Act 42 U.S.C. §3601 et.seq. (federal)	Complaint to HUD within 1 year of alleged discrimination, and/or lawsuit within 2 years	<ol style="list-style-type: none"> 1. Injunctive relief, 2. Money damages, 3. Punitive damages, and 4. Attorney's fees
Title II of the Americans with Disabilities ACT (ADA) (federal)	Complaint to designated federal agency within 180 days and/or federal court within 3 years.	<ol style="list-style-type: none"> 1. Injunctive relief, 2. Money damages, 3. Attorney's fees and costs.

M. Section 504

Section 504 has potentially three enforcement procedures: an internal grievance procedure; filing a complaint with HUD (or whichever federal agency provides funding to the housing provider); or filing a lawsuit against the housing provider.

1. INTERNAL GRIEVANCE PROCEDURES

If you are a recipient of federal money and employ 15 or more persons company/housing authority wide, you must establish an internal grievance procedure that incorporates “appropriate due process standards” for the “prompt and equitable” resolution of complaints under §504 except complaints from applicants for housing.²⁷⁸ You must also designate at least one person to coordinate your efforts to comply with this requirement.²⁷⁹

Use of the internal grievance procedure is entirely optional for the tenant or applicant. The complainant at any time may decide to file with HUD.

2. A 504 COMPLAINT WITH HUD

If an applicant or tenant in federally financed housing believes that she has been discriminated against because of her disability, she may file a complaint with HUD. The following chart summarizes what happens after an applicant or tenant files a complaint with HUD. A discussion of what happens when an applicant or tenant files a complaint with HUD follows.

Complaints must be filed within 180 days of the alleged discrimination.²⁸⁰ This time may be extended if there is a very good reason for filing the complaint late.²⁸¹ For example, if a person was unable to file the complaint because her disability prevented her from being aware that she was discriminated against, HUD may be willing to allow her more time to file a complaint. Also, if there is a continuing act of discrimination, then the complaint may be filed while the discrimination continues or within 180 days of the last act of discrimination.

Once the complaint is filed, HUD assumes responsibility for investigating the facts and determining whether unlawful discrimination occurred. **Housing providers should consult their lawyers** and on their lawyers’ advice take an active role in providing relevant facts and information to the investigator assigned to the complaint. For example, you should give the names, addresses, and

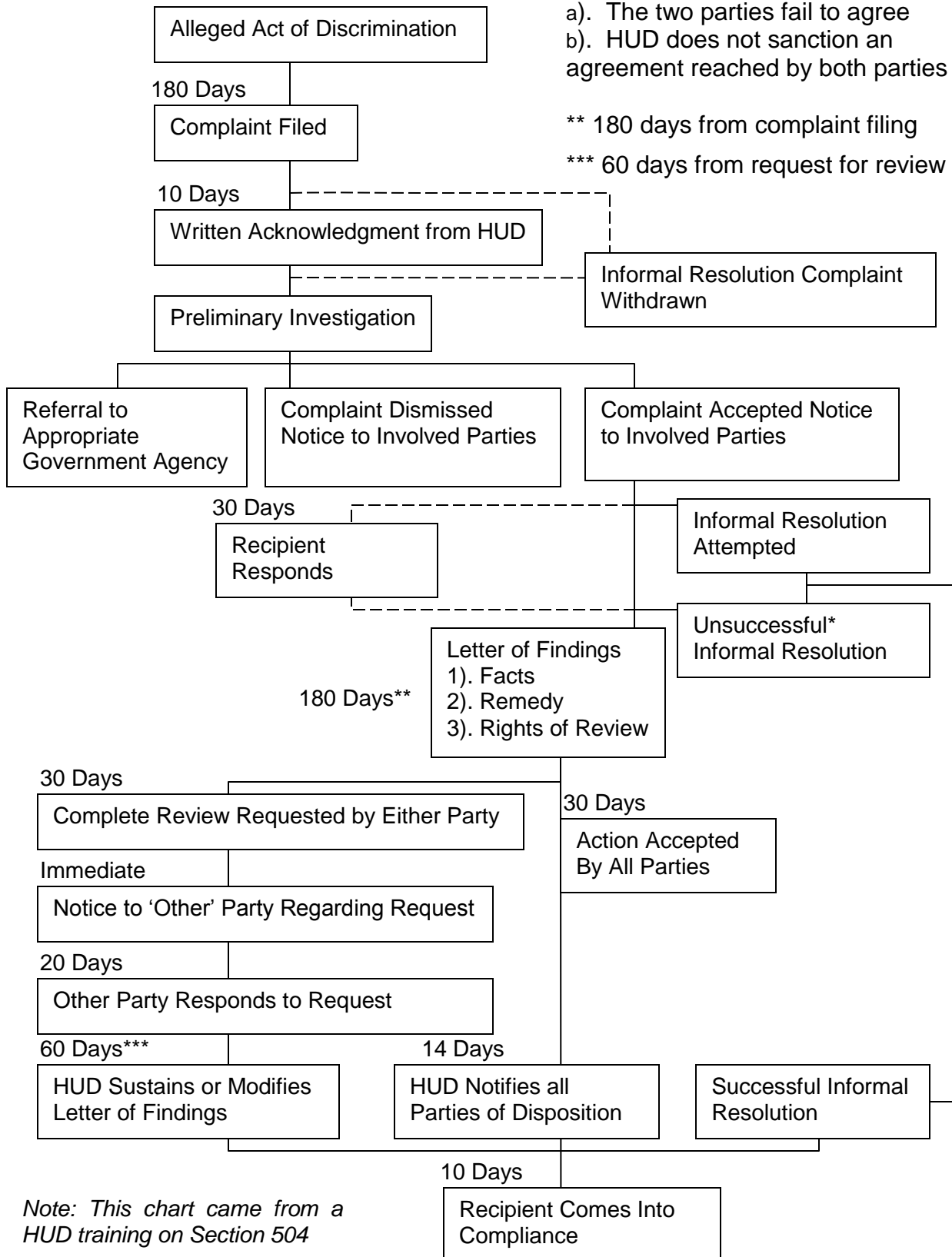
telephone numbers of witnesses involved and other people with relevant information, such as service providers.

(504) COMPLAINT RESOLUTION PROCESS

* An unsuccessful informal resolution occurs when:
 a). The two parties fail to agree
 b). HUD does not sanction an agreement reached by both parties

** 180 days from complaint filing

*** 60 days from request for review



Note: This chart came from a HUD training on Section 504

During its investigation, HUD will try to talk to both you and the complainant to try to resolve the complaint. You should continue to work with your lawyer, offering information and proposing solutions to the investigator during this process of negotiation and reconciliation if you and your lawyer feel a resolution is possible.

Following its investigation, HUD will issue a letter of findings. This letter will give a summary of the facts and state HUD's conclusions as to whether discrimination occurred. If you or the complainant thinks that there is more information that might change HUD's decision, you can send the information to HUD with a letter requesting a review. This has to be done within 30 days after you (or your representative) receive the Letter of Findings. If you have not already consulted a lawyer, it is imperative that you do so at once before sending off a request for review. If neither party makes a request, HUD has 14 days to send a letter to both parties stating its final decision. If HUD finds that you discriminated against the complainant, you will have 10 days to agree to correct the problem. The resolution of complaints with HUD is supposed to occur within six months. Often it may take longer.

a. Remedies

If HUD determines through its investigation that discrimination occurred, it could order you to stop discriminating against the complainant (i.e., give the applicant the apartment you illegally denied, provide a reasonable accommodation, etc), to pay monetary damages, make changes in policies or procedures, conduct training programs for staff, and undergo additional monitoring and enforcement activities. Ultimately, HUD has the authority to suspend temporarily or to terminate your federal funds or to defer the award of new funds.

3. FILING A LAWSUIT

Instead of or in addition to filing an administrative complaint, a complainant may file a lawsuit in state or federal court within three years.²⁸² The three-year statute of limitations runs from the date of the alleged discrimination, regardless of whether or not a complaint has been filed with HUD. If a complaint is filed with HUD and it is still unresolved by the end of the three-year period, the complainant must file a lawsuit immediately or else give up the right to sue on that complaint. If a Section 504 complaint has been filed with HUD, a housing provider cannot remove the case to court.

a. Remedies

If the complainant prevails in a lawsuit, she may recover compensatory damages for financial losses sustained and attorney's fees. In addition, the court may order you to stop your discriminatory practices (and/or provide reasonable accommodation).

N. Fair Housing Amendments Act, As Amended in 1988 (FHAA)

HUD is responsible for enforcing this statute as well. Violations of the law may also be taken to court within two years of the alleged discrimination. See the chart on page 118 for a description of the remedies that can be awarded a complainant if she prevails.

The following chart summarizes what happens after an applicant or tenant files a complaint under the Fair Housing Act with HUD. A discussion of what happens when an applicant or tenant files a complaint with HUD follows.

1. FILING A FHAA COMPLAINT WITH HUD

If an applicant/tenant believes that she has been discriminated against because of her disability, she may file a complaint with HUD under the FHAA. A person has one year after the alleged discrimination or one year after termination of an alleged continuing practice of discrimination to file an administrative complaint.²⁸³

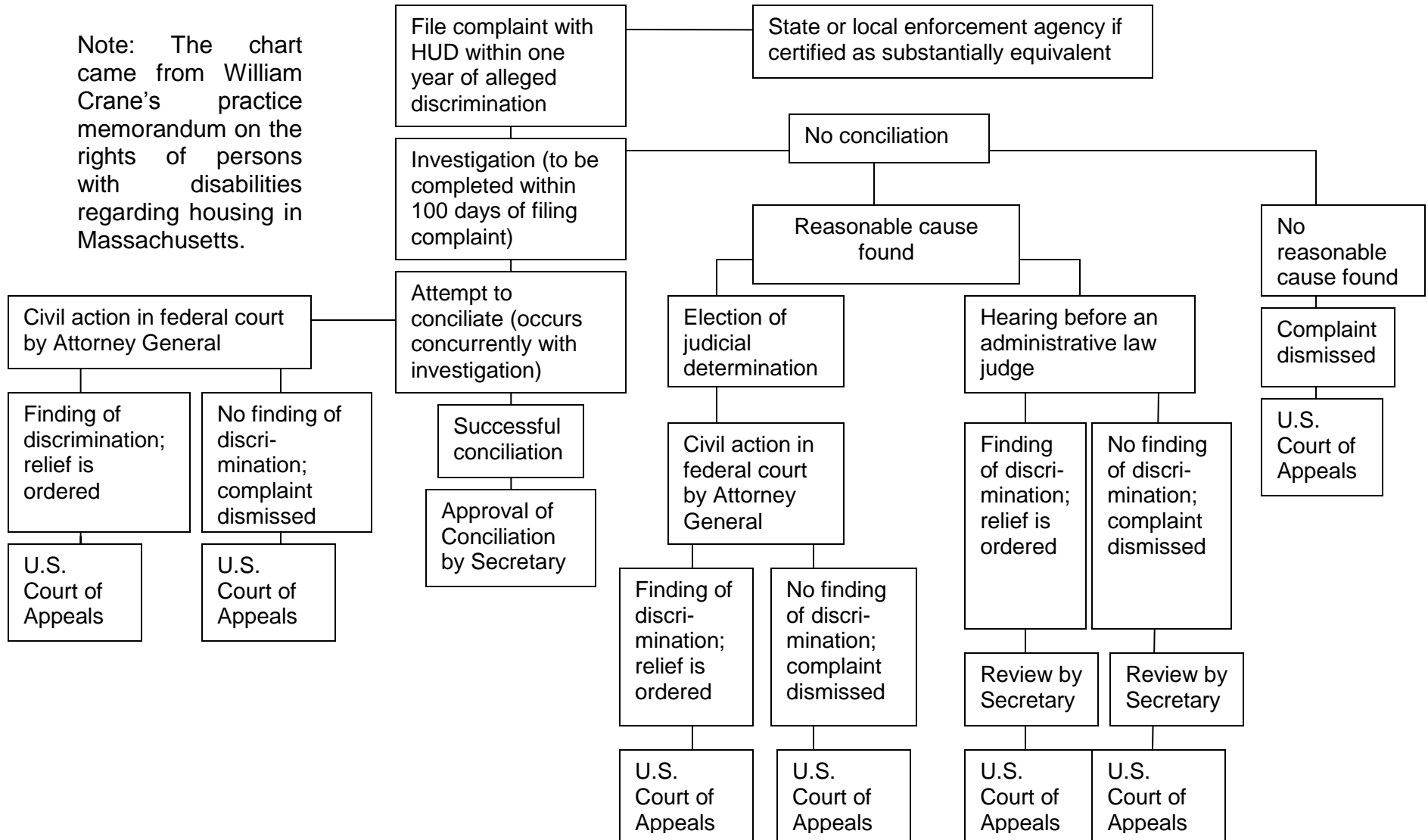
a. Referral of Complaint to a State or Local Agency

If a person alleges a discriminatory housing practice within a state or locality which has a fair housing law or ordinance which has been certified by HUD as being substantially equivalent to the Fair Housing Act, HUD must refer the complaint to the agency administering such law or ordinance before taking action with respect to the complaint.²⁸⁴ After referral, HUD may take no further action with respect to the complaint except in limited circumstances.²⁸⁵

For example, the Massachusetts Fair Housing Law has been certified as a "substantially equivalent" law. Although HUD will refer the applicant or tenant's claim to the MCAD under the Fair Housing Act, it will retain the §504 complaint. HUD may investigate this complaint while the MCAD is investigating the claim under the Fair Housing Act.

The HUD Administrative Complaint Process (For the Federal Fair Housing Act)

Note: The chart came from William Crane's practice memorandum on the rights of persons with disabilities regarding housing in Massachusetts.



b. Investigation of the Complaint

If the complaint is not referred to a state or local agency, HUD will proceed with its own enforcement procedures including asking the housing finance agency or the local housing authority to investigate and resolve the matter if possible. The investigation is supposed to be completed within 100 days, unless it is not practical to do so.²⁸⁶

At the end of the investigation, HUD prepares a final investigative report. Information, which is derived from the investigation, has to be made available to you upon request. You should receive a letter from HUD stating that the report is available and how to obtain it.²⁸⁷

c. Conciliation

To the extent feasible, HUD will engage in efforts to conciliate the matters raised in the complaint.²⁸⁸ Conciliation and investigation are intended to be going on at the same time.²⁸⁹ A conciliation agreement between you and the complainant must be approved by HUD.²⁹⁰

The following types of relief may be sought in conciliation: (1) monetary damages; (2) injunctive relief; and (3) other equitable relief, including access to the dwelling at issue, or to a comparable dwelling, or other specific relief.²⁹¹

If HUD has reasonable cause to believe that you have failed to keep a conciliation agreement, it must refer the matter to the Justice Department (Attorney General) with a recommendation that a civil action be filed under Section 814 of the Act to force you to keep the agreement.²⁹²

d. Prompt Judicial Action

At any time after the complaint is filed, HUD may conclude that a quick response is necessary to carry out the purposes of the Act. HUD will then authorize the Justice Department to go to court for a temporary order, such as a restraining order, until HUD resolves the complaint.²⁹³

e. Charging the Respondent (Housing Provider)

If HUD determines that there is reason to believe that you discriminated against the complainant (“reasonable cause”), and you and the complainant have not agreed to settle the matter (a conciliation

agreement), HUD must immediately issue a charge on the complainant's behalf.²⁹⁴ HUD has to send both you and the complainant a copy of the charge together with information about how to choose whether you want your case to be tried before a hearing officer or in court.²⁹⁵

If HUD determines that there is not good evidence that discrimination occurred, it must dismiss the complaint promptly. If the complainant disagrees, she may then go to court. This is discussed below.

f. Election of Judicial Determination

When a charge is filed at HUD, you or the complainant may choose to have the claim tried in a civil action in federal district court instead of an administrative hearing.²⁹⁶ The choice must be made within 20 days after receipt of service of the charge.²⁹⁷ You should consult your lawyer immediately to determine what is best for you.

If either party elects to have the claim tried in court, HUD must immediately notify and authorize the Justice Department to commence a civil action on the complainant's behalf in an appropriate U.S. District Court.²⁹⁸ The Justice Department must commence such civil action within 30 days after the election is made.²⁹⁹

If at the trial the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief which a court could grant in a civil action brought by a private person.³⁰⁰ Any prevailing party including housing providers, except the U.S., may be awarded attorney's fees.

g. Administrative Law Judge Hearing

If an election to remove the case to federal district court is not made, HUD must provide for a hearing before a HUD Administrative Law Judge within 120 days after the charge is issued unless it is impracticable to do so.³⁰¹ At the hearing each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses and obtain issuance of subpoenas.³⁰² The ALJ must make an initial decision within 60 days after the end of the hearing unless impracticable.³⁰³

h. Relief

If the ALJ finds against you, she may order actual damages (including damages caused by humiliation and embarrassment) and injunctive relief.³⁰⁴

i. Review

The Secretary of HUD may review the ALJ order. She may affirm, modify, or set aside the decision in whole or in part. She may also remand the decision for further proceedings.³⁰⁵ This review must be completed within 30 days after the decision is issued. If the review is not completed, the initial decision becomes a final decision.³⁰⁶

Any person adversely affected by a final decision of HUD may file a petition for review in the U.S. Court of Appeals for the circuit in which the discriminatory housing practice is alleged to have occurred, within 30 days after the order is entered.³⁰⁷ If no petition for review is filed within 45 days after the order is entered, the findings of fact issued and final decision will not be able to be changed and the order will be enforced as is.³⁰⁸

j. Enforcement

If the respondent does not comply, HUD may ask the U.S. Court of Appeals to enforce the final decision and for any appropriate relief or restraining order. If HUD has not gone to court to enforce the decision before the expiration of 60 days from the date of the final decision, any person entitled to relief under the final decision can go to the U.S. Court of Appeals for the circuit in which the discriminatory practice is alleged to have occurred for a court order enforcing the decision.

O. Title II of the ADA

If you employ fifty (50) or more persons you must establish an internal grievance procedure for the “prompt and equitable” resolution of all complaints under Title II of the ADA.³⁰⁹ You must also designate at least one person to coordinate your efforts to comply with this requirement and make this person’s name and address available to anyone who wants it.³¹⁰

Use of the internal grievance procedure is entirely optional for the tenant or applicant. The complainant at any time may decide to file a complaint with HUD or file a lawsuit. If a housing provider also receives federal funds, HUD will follow

the same procedures as under §504 of the Rehabilitation Act. See Section M for a description. Also refer to the chart on page 118 for a list of remedies that may be available to applicants and tenants who prevail in discrimination claims.

Chapter 3

MASSACHUSETTS DISABILITY DISCRIMINATION LAWS

In addition to the federal laws, housing providers also have to comply with state laws, which prohibit discrimination against persons with disabilities in housing. The following is a brief description of each of these laws in Massachusetts: Chapter 151B, Amendment Article 114 of The Massachusetts Constitution, The Massachusetts Equal Rights Law, and Massachusetts Executive Order 246. The Massachusetts Architectural Access Law is also discussed briefly in the context of alterations of existing housing. The focus of this chapter will be Chapter 151B because this is the primary law used by individuals with disabilities in Massachusetts to redress discrimination.

A module summarizing many of the laws in Massachusetts which prohibit discrimination in housing appears on page 130. It includes the types of practices, which are prohibited and required by each law, the type of housing covered, each law's definition of a person with a disability, and whether individuals with a psychiatric disability, those who have substance abuse or a history of a substance abuse problem, and individuals who are HIV positive or have AIDS are covered. Page 137 contains a chart showing how each law is enforced and what remedies are available.

State Laws Prohibiting Discrimination in Housing Against People With Disabilities

Law	Types of Practices Which Are Prohibited or Required	Housing Covered	Definition of Person with a Disability (Handicap)
Chapter 151B (state)	<ol style="list-style-type: none"> 1. Cannot Discriminate 2. Must provide a reasonable accommodation 	All housing except owner-occupied two-family housing	<p>A person who:</p> <ol style="list-style-type: none"> 1. has a physical or mental impairment which substantially limits a major life activity, such as walking, thinking, speaking, hearing, learning, breathing... <small>311</small> 2. a record or history of an impairment which limits a major life activity, even if the person no longer has the disability or if the disability no longer limits a major life activity, or 3. is regarded as having an impairment that limits a major life activity.
Amendment Article 114 Massachusetts Constitution (state)	<p>Cannot discriminate, deny benefits, or exclude on the basis of disability</p> <p>Modeled on 504</p>	Any housing program, includes public and private conduct	no definition- probably same as 504
Equal Rights Law M.G.L. c.93 §103 (state)	<ol style="list-style-type: none"> 1. Must provide individuals with disabilities same rights to make and enforce contracts 2. Reasonable Accommodation 	All housing because it covers anyone discriminating in Massachusetts	no definition

Are People With Psychiatric Disabilities Covered?	Is Illegal Drug Use Covered?		Are People Who Have Alcoholism Covered?	Are People with AIDS or HIV+ Covered?
	Current Use	History of Use		
<p>YES,</p> <ol style="list-style-type: none"> 1. if the psychiatric disabilities substantially limit a major life activity, or; 2. if a housing provider thinks the person's psychiatric disabilities or perceived psychiatric disabilities limit a major life activity, or; 3. if the person has a history of psychiatric disabilities which limits a major life activity and the housing provider discriminates against the person because of the history. 	Statute does not contain exclusion	YES	YES	YES
silent	silent	silent	silent	silent
silent	silent	silent	silent	silent

A. Chapter 151B, Commonly Referred To As The Massachusetts' Housing Bill Of Rights Act For People With Disabilities:

Chapter 151B is analogous to the Fair Housing Amendments Act.³¹² The law prohibits all forms of discrimination in the sale or rental of a dwelling to the buyer or renter because of that person's disability.³¹³ Discrimination is unlawful with respect to the terms, conditions, or privileges of any sale or rental of a dwelling, or in the provision of any services of facilities in connection with the dwelling.³¹⁴

1. HOUSING COVERED

This law covers every kind of multi-family housing except owner-occupied, two-family housing.³¹⁵

2. INDIVIDUALS PROTECTED BY THE LAWS

Chapter 151B uses the federal wording in defining a person with a disability: A person who:

- a. has a physical or mental impairment which "limits a major life activity";
- b. has a record or history of such an impairment; or
- c. is perceived as having a disability.³¹⁶

The physical or mental impairment can include almost any condition, disease, illness, disfigurement or disorder (e.g., alcoholism, AIDS, emotional disorder, mental retardation, cerebral palsy, and HIV infection) if it limits at least one thing a person would normally do. This law clearly protects individuals with AIDS, HIV,³¹⁷ psychiatric disabilities, alcoholism, as well as individuals who have a history of a psychiatric disability or are perceived as having a psychiatric disability.³¹⁸

3. DIFFERENCES IN STATE LAW

Historically, the most significant way in which Massachusetts differed from federal courts was in the interpretation of the definition of person with a disability. In Massachusetts, the use of corrective devices is not relevant to the determination of disability, whereas the United States Supreme

Court said it was.³¹⁹ However, an amendment to the Americans with Disabilities Act, which went into effect January 1, 2009, states that corrective measures other than “ordinary glasses or contact lenses” are no longer to be considered when determining whether a person meets the ADA definition of “substantially impaired in one or more major life activities”. As such, MA state law and federal law are analogous in this regard now.

The Massachusetts law also does not include any language exempting people whose tenancy would constitute a direct threat to other individuals or to property or use the “otherwise qualified” language contained in Section 504.³²⁰ However, Massachusetts courts are likely to interpret the state law as allowing the exclusion of those who pose a threat.³²¹

Massachusetts also has more stringent requirements regarding owners’ obligations to pay for accommodations as described below.

4. REASONABLE ACCOMMODATION

The state law in Massachusetts requires all covered owners to provide reasonable accommodations in all rules, policies, practices and services.³²² The state law does not require all housing providers to pay for a physical modification of the premises, but does require owners to permit the tenant to make the modification at her own expense. However, unlike the federal Fair Housing Act, owners of publicly assisted housing, multiple dwelling housing consisting of ten or more units, and contiguously located housing consisting of ten or more units in Massachusetts are required to pay for reasonable modifications to enable the applicant/tenant to have an equal opportunity to use and enjoy a dwelling unit; other housing providers are required to permit or to make, at the expense of the person with the disability, reasonable modification.³²³ Under this law, the term “reasonable modification” includes but is not limited to installing raised numbers or a flashing-light doorbell, lowering a cabinet, ramping a front entrance of five or fewer steps, widening a doorway or installing a grab bar, but does not include ramping more than five steps or installing a wheelchair lift.³²⁴

As under federal law, this law does not require a housing provider to provide an accommodation if it would impose an undue financial and administrative burden or would fundamentally alter the nature of the

program. Under state law, if an accommodation wouldn't pose a fundamental change but would pose an undue financial burden, a housing provider is still required to allow this accommodation if the person with the disability agrees to pay for it. This statute allows a landlord to require a tenant when responsible under the law to pay for a modification to restore or pay for the cost of restoring the unit to the prior marketable condition, reasonable wear and tear excepted, which is analogous to the Federal Fair Housing Act.³²⁵

B. Amendment Article 114 of the Massachusetts Constitution:

This amendment was adopted in 1990 and reads:

“No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the Commonwealth.”

This amendment is almost identical to Section 504 of the Rehabilitation Act except that it is not limited to programs or activities receiving federal financial assistance. It seems likely that courts will look to the regulations and cases under Section 504 in interpreting Article 114.

Article 114 has been deemed applicable only in cases where there is no other adequate way to vindicate the public policy that has been violated.³²⁶ Because Chapter 151B has been found to provide an adequate means of redressing disability discrimination, a claim brought under Article 114 alone would likely be dismissed.³²⁷

C. The Massachusetts Equal Rights Law (M.G.L. C.93 §103):

This law was adopted in 1990.³²⁸ It provides in part that:

“All persons within the Commonwealth, regardless of handicap . . . shall, with reasonable accommodation, have the same rights as other persons to make and enforce

contracts, inherit, purchase, sell, hold and convey real and personal property, sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property including but not limited to, the rights secured under Article [114] of the Amendments to the Constitution.”

This law was closely modeled on a federal civil rights law enacted after the Civil War to ensure to African-Americans “the right to make and enforce contracts.” The federal law has been held to prohibit discrimination in housing on the basis of race.³²⁹ Since the purpose of the Massachusetts laws was to duplicate the rights protected by federal law on the state level, it seems likely that Massachusetts’s courts will similarly interpret the equal rights laws to prohibit housing discrimination.

D. Massachusetts Executive Order 246:

This was signed into law in November of 1984. This order adopts a Code of Fair Practices that prohibits discrimination on the basis of disability by state agencies and requires that positive and aggressive measures be taken by state agencies to ensure equal access to housing.³³⁰

E. The Massachusetts Architectural Access Law:

The Massachusetts Architectural Access Law addresses the accessibility standards a housing provider needs to meet if she is making alterations in an existing facility. Under this law the amount of accessibility required depends on the cost of the alterations in relation to the total value of the building or facility.³³¹ The Architectural Access Board, which enforces this law, has issued regulations, which contain the formula used to determine whether, and to what degree compliance has to occur.³³²

It is important to understand the state law in Massachusetts, as well as the applicable federal accessibility code(s) (UFAS, ADAAG), because the state law is stronger than the federal laws in many ways. One important area of difference is what ratio of the alteration costs to costs of a new facility triggers state standards. If a housing provider in Massachusetts makes alterations to an existing facility, the work must

conform to both Massachusetts and federal laws. This can be extremely confusing. The Massachusetts Architectural Access Board is trying to get the state code deemed substantially equivalent to ADAAG so that providers would only have to comply with the state code. As of this writing this has not happened.

F. Enforcement and Remedies under Massachusetts' Disability Discrimination Laws

The module on page 137 summarizes the enforcement mechanisms and remedies available under Massachusetts's disability discrimination laws. A discussion of each law's enforcement mechanism(s) and remedies follows.

State Enforcement Mechanisms and Possible Remedies

Law	Enforcement	Possible Remedies
Housing Bill of Rights Act Chapter 151B (c.722 of Acts of 1989) (state)	<ol style="list-style-type: none"> 1. Complaint to MCAD within 6 months of alleged discrimination, or; 2. lawsuit filed within 1 year or alleged discrimination if no complaint filed with MCAD, or; 3. within 3 years of filing MCAD complaint. 	<ol style="list-style-type: none"> 1. Injunctive relief 2. Damages for financial loss and emotional distress 3. Costs and attorney's fees 4. Punitive damages in court action.
Amendment Article 114 Massachusetts Constitution (state)	<ol style="list-style-type: none"> 1. Civil Rights suit filed in Court within 3 years of discrimination 	<ol style="list-style-type: none"> 1. Probably injunctive and compensatory damages 2. Costs and attorney's fees
Equal Rights Law M.G.L. c.93 §103 (state)	<ol style="list-style-type: none"> 1. Civil suit filed in Court; 3-year statute of limitations 	<ol style="list-style-type: none"> 1. Injunctive and other equitable relief, including compensatory and exemplary (punitive) damages 2. Costs and attorney's fees

1. **CHAPTER 151B—MASSACHUSETTS HOUSING BILL OF RIGHTS**

The Massachusetts Commission Against Discrimination (MCAD) and the courts have responsibility for enforcing Chapter 151B. MCAD is a quasi-judicial agency responsible for investigating and resolving complaints under this statute. MCAD's investigatory and enforcement procedures are set forth in law and regulations.³³³ The decisions of the MCAD are reported in the "Massachusetts Discrimination Law Reporter." Although MCAD has responsibility for enforcing this statute, violations of the law may also be taken to court. The following chart summarizes the enforcement procedures under Chapter 151B. The discussion, which follows, explains the process of filing an MCAD complaint, the investigatory process, the appeals process, and enforcement in court.

2. **FILING WITH THE MCAD**

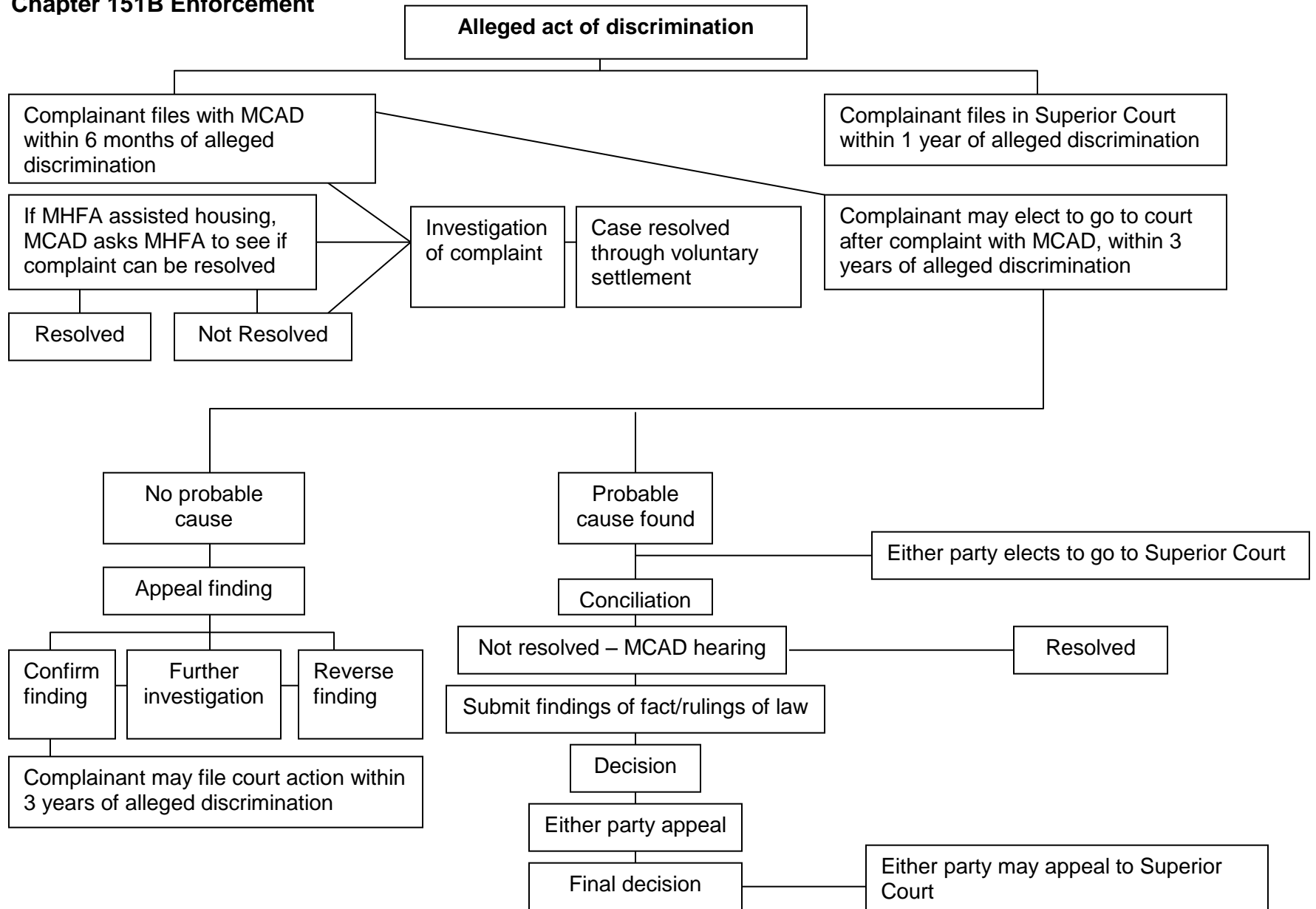
If an applicant or tenant believes she has been discriminated against because of her disability, she may file a complaint with the MCAD within six months of the alleged discrimination.³³⁴

a. The Investigation

MCAD designates one of its Commissioners to be the Investigating Commissioner for each complaint.³³⁵ If the discrimination complaint involves MassHousing housing, MCAD will ask MassHousing to investigate the matter and see if it can resolve the matter. If it cannot, MassHousing will tell the MCAD, and the MCAD will continue its investigation.

Both parties may be represented by an attorney or other advocate during MCAD's investigation and proceedings.³³⁶ **Housing providers should seek counsel for MCAD proceedings.** During the investigation period or at any time prior to MCAD determining whether there has been discrimination, parties may resolve the complaint through voluntary settlement.

Chapter 151B Enforcement



After the investigation, the Investigating Commissioner determines whether there is believable evidence indicating that discrimination probably occurred (i.e., "probable cause"). As a general rule, this determination is supposed to be made within 120 days of filing the complaint.

If no probable cause is found, the complainant has the right to appeal this decision within 10 days of the receipt of the decision by requesting an informal hearing before the Investigating Commissioner.³³⁷ At the hearing, both sides will be given an opportunity to state why the lack of probable cause finding should be upheld or reversed and to provide additional documentation to support their positions.

b. Conciliation Agreement

If probable cause is found, the Investigating Commissioner will try to eliminate the alleged unlawful discrimination through conference, conciliation, and persuasion. MCAD will provide an attorney to present the complainant's case (but not formally represent her) once the MCAD has found probable cause. At this point, MCAD will seek agreement for full compensatory relief for the complainant. If an agreement is reached by the parties, a written conciliation agreement establishes the terms of the agreement and is signed by both parties and the Investigating Commissioner.

c. Hearing

If the complaint cannot be resolved by conciliation, an MCAD Commissioner will hold a hearing and then issue a written decision, either finding discrimination and ordering relief or finding no discrimination and dismissing the complaint. You should consult your attorney before taking any steps in relation to an MCAD hearing. If the complainant is not represented, an attorney employed by MCAD will present the case on her behalf.³³⁸ The hearing is similar to a trial before a judge. Both parties have the opportunity to present and cross-examine witnesses and to introduce documentary evidence in support of their case.

Following the hearing, the parties have an opportunity to present written requests for finding of fact and rulings of law.³³⁹ If a housing provider has not already sought counsel, she should do so before submitting such requests. Either party may appeal by filing a notice of appeal to the full commission within 10 days of receipt of the decision. In addition, a pleading stating the reasons for the appeal must be filed within thirty (30) days after the notice.³⁴⁰

Either you or the complainant may appeal the Commission's final order to superior court.³⁴¹ An appeal of a final order of MCAD must be begun within thirty (30) days of receipt of the order of the Commission.³⁴² The standard of review by the court is governed by the Massachusetts Administrative Procedure Act.³ This standard requires the court to give "substantial deference"³⁴⁴ to the determinations of fact by MCAD and does not allow a jury trial.

d. Enforcement in Court

A complainant may choose to go to court instead of having her case decided by the MCAD. If the MCAD finds probable cause, a complainant or respondent can choose to go to court instead of having an MCAD Commissioner decide the case. A complainant may file directly in court without going to the MCAD within one year of the alleged discrimination, or remove her case from the MCAD and file in court before the MCAD issues a final order in the case, within three years of the alleged discrimination.

e. Remedies

Under Chapter 151B, a complainant may be entitled to injunctive relief, damages for financial loss and emotional distress (if any), costs and attorney's fees in both an MCAD proceeding and a court action.³⁴⁵ She may also be entitled to punitive damages in a court action.³⁴⁶

G. Massachusetts Constitutional Amendment Article 114 In Conjunction With The Massachusetts Equal Rights Act

Article 114 can be enforced by the Massachusetts Equal Rights Act. It is enforced by filing suit in court within three (3) years of the act of discrimination. In such a suit, an individual may obtain injunctive relief (i.e., an order to stop the discriminatory behavior) and money damages, including costs and attorney's fees.

Article 114 has been deemed applicable only in cases where there is no other adequate way to vindicate the public policy that has been violated.³⁴⁷ Because Chapter 151B has been found to provide an adequate means of

redressing disability discrimination, a claim brought under Article 114 alone would likely be dismissed. In cases in which discriminatory action under Amendment Article 114 is accompanied by threats, intimidation, or coercion; a lawsuit can also be filed under the Massachusetts Civil Rights Act.³⁴⁸

H. The Massachusetts Architectural Access Law

The Massachusetts Architectural Access Law is enforced by the Architectural Access Board (AAB). The Architectural Access Law may be enforced by filing a complaint with the AAB. The AAB is located at 1 Ashburton Place, Room 1310, Boston, MA 02108, Phone: 617-727-0660. The Board has special complaint forms which may be obtained by mail, in person or at www.state.ma.us/AAB. In addition, building owners who believe that compliance with the regulation would be impractical, may file a request for a variance. Upon receipt of a complaint or a request for a variance, the AAB is required to investigate. If the complaint cannot be resolved informally, the AAB will hold a public hearing at which the complainant, the building owner, and other interested persons may attend and present evidence. If the Board finds a violation or denies a request for a variance, the owner must bring their building or other structure into compliance with the regulations by a date ordered by the Board. The AAB may impose fines up to \$1,000 per day for noncompliance with its orders. Either party may appeal a finding by the AAB to the state Superior Court within thirty (30) days after the decision.³⁴⁹

Endnotes

INTRODUCTION

- a. The terms, disability and handicap, are both used in this handbook because different laws have historically or currently use different terms. The terms have the same legal meaning, but the preferred term is disability. See Joint Statement of the Department of Housing and Urban Development and the Department of Justice, **Reasonable Accommodations Under the Fair Housing Act**, May 17, 2004 (Hereinafter Joint Statement on Reasonable Accommodation) and Joint Statement of the Dept. of Housing and Urban Development and the Dept. of Justice: **Reasonable Modifications Under the Fair Housing Act**, March 5, 2008 (Hereinafter HUD/DOJ Joint Statement on Reasonable Modification). For example, Section 504 originally used the term handicap. The statute was changed to use the term disability but the HUD regulations haven't changed.
- b. 29 U.S.C. §794.
- c. 42. U.S.C. §12131 et. seq. and 42 U.S.C 12182 et. seq.
- d. 42 U.S.C. §3601 et. seq.
- e. § 28 CFR §35.01 and § 36.104, Definition of Disability and Analysis.
- f. See HUD/DOJ Joint Statement on Reasonable Modification, Question 31, page 16 and 28 CFR §35.130(b)(7). Throughout this handbook, we are using the term reasonable accommodation to include changes in rules, policies, procedures, services and physical modifications because we are presuming that Housing Providers who will be using this Handbook own or operate housing that receives federal dollars.

CHAPTERS 1-3

1. 42 U.S.C. §3604(f)(3)(B); 24 C.F.R. §100.204(a)(FHA); 28 C.F.R. §35.130(b)(7)(Title II of the ADA); 24 C.F.R. §8.6(a)(2) and (b); and 24 C.F.R. §8.33 §(504) AND 24 CFR §8.4, 8.11, 8.24, 8.33(504); HUD/DOJ Statement on Reasonable Modification; HUD/DOJ Statement on Reasonable Accommodation.

2. See *HUD v. Pheasant Ridge Associates, Ltd.*, FH-FL Rptr. 25,123 (HUD Office of Admin. Law Judges, Oct 25, 1996; *Bolthouse v. Continental Wingate Co., Inc.* 656 F. Supp 620 (W.D. Mich. 1987).
3. See *Robards v. Cotton Mill Associates*, 677 A.2d 540 (Maine 1996); *Niederhauser v. Independence Square Housing*, FH-FL Rptr. ¶16,305, No. C 96-20504 (N.D. Cal. Aug 27, 1998). Also see HUD/DOJ Statement on Reasonable Accommodation, Question 16, pages 11-12 as well as HUD Handbook 4350.3 Rev-1, Par. 4-26 Verification of Preferences(B.4.d.), beginning on pg. 4-56 and Par. 4-29, beginning on pg. 4-62. Verifying the Need for Accessible Units
4. The regulations for this program are at 24 C.F.R. Part 982.553, **Denial of admission and termination of assistance for criminals and alcohol abusers**. For an excellent explanation of this program see, *The Section 8 Housing Choice Voucher Program: Making Housing Markets Work for Low-Income Families*, by CLPHA, NAHRO, PHADA and NLHA, March 2002.
5. Medical Marijuana. Massachusetts state law, Chapter 369 of the Acts of 2012 (the Act) allows individuals who qualify due to a “debilitating medical condition” to obtain and use marijuana for medicinal use provided the person has obtained a written certification from a physician with whom the patient has a bona fide physician-patient relationship. The statute and implementing regulations provide a debilitating medical conditions are defined as: “Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis and other conditions as determined in writing by a qualifying patient's physician.” (Section 2.(C) of the Statute .and at 105 CMR 725.004). Effective February 1, 2015, paper certifications from physicians are not sufficient for compliance with registration requirements under DPH Marijuana Regulations. **All** patients are required to obtain an *electronic* certification from their physician stating the patient’s specific debilitating medical condition and symptoms, as well as that the potential benefit of the medical use of marijuana outweighing any associated health risks for the patient *and* be registered with the Medical Use of Marijuana Program to possess marijuana for medical use. The law and its implementing regulations, which can be found at 105 CMR 725

specify the limits of possession and the circumstances under which a qualifying patient or caregiver is permitted to cultivate plants to for the patient's personal use, as well as the parameters for the quantity for that growth. This is referred to as "home-cultivation" or the "hardship waiver".

The law and its implementing regulations do not give immunity under federal law or obstruct federal enforcement of federal law. Section 6 (F) and 105 CMR 725.650 provide that nothing in this law requires the violation of federal law or purports to give immunity under federal law. For more information on Massachusetts State law, please see <http://www.mass.gov/eohhs/gov/departments/dph/programs/hcq/medical-marijuana/>

HUD has issued guidance detailing that the manufacture, distribution or possession of marijuana, even for medical purposes, is a violation of the Controlled Substance Act (21 U.S.C Section 201 et. seq.) even if state law permits it. In addition, in accordance with the Quality Housing and Work Responsibility Act of 1998 (QWRA) public and assisted housing providers are required to deny admission to anyone who currently illegally uses a controlled substance as the term is defined in the Controlled Substance Act. **Please see Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing, January 20, 2011.** However, although PHAs and owners may not grant reasonable accommodation requests for medical marijuana, Guidance from HUD's office of Multifamily housing states that QWRA permits Owners discretion on developing policies and procedures **to determine when it is appropriate to terminate, or not to terminate, tenancy for use of marijuana. See Use of Marijuana in HUD Multifamily Assisted Properties, December 29, 2014.**

6. HUD's PIH office has issued numerous notices over the years supporting this position. For example, Accessibility Notice: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; the Architectural Barriers Act of 1968 and the Fair Housing Act of 1988, PIH 2006-13(HA), issued March 8, 2006, page 11, cross referencing PIH 2003-31, issued Nov. 26, 2003, which replaced PIH 2002-01. This notice was reinstated on September 21, 2007 via PIH Letter L-2007-5. The most current notice, cites the Fair Housing Act's section on illegal inquiries at 24

CFR Section 100.202 to support its position. See Non-Discrimination and Accessibility for Persons with Disabilities, PIH 2010-26(HA), issued July 26, 2010 (hereinafter, PIH Non-Discrimination Notice), which cross references previous HUD Notices related to the topic (PIH 2003-31, PIH 2006-13, PIH Letter L-2007-05 and PIH 2009-5), which is referenced in HUD's Guidance on non-discrimination and equal opportunity requirements for PHAs, PIH-2011-31, issued 6/13/2011 (also referenced as FHEO-2011-1). This notice provides that it does not supersede PIH notice 2010-26 or any subsequent notice but should be read in conjunction with it as well as the legal authorities cited. Also see HUD/DOJ Statement on Reasonable Accommodation, Question 16, pages 11-12.

7. See Screening and Eviction for Drug Abuse and Other Criminal Activity, Final Rule, published at Federal Register, Vo. No. 66, No.101, May 24, 2001 and implemented in 24 CFR Parts 5 et al. (Hereinafter Final Screening Rule). In accordance with this Final Rule, PHA screening requirements are contained in 24 CFR Part 960-Admission to and Occupancy of Public Housing.
8. Id.
9. Id, at 24 CFR Part 5, Subpart I-Preventing Crime in Federally Assisted Housing-Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse. Also see HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs Revised most recently 10/13, hereinafter referred to as HUD Handbook HUD Handbook 4350.3, paragraph 4-7C., beginning on page 4-19, Screening for Drug Abuse and Other Criminal Activity. Please note that owners are not required to conduct a background check on applicants applying for an unassisted unit or tenants living in an unassisted unit in a project-based property. Owners may conduct background checks on applicants for unassisted units if they wish. (HUD Handbook 4350.3, Implementing Screening Reviews, par. 4-27 E., pg. 4-59. **Screening for Drug Abuse and Other Criminal Activity**).
10. See PIH Nondiscrimination Notice, pg. 13 and PIH Accessibility Notice, p.13. These notices cite the Fair Housing Act's section on illegal inquiries at 24 CFR Section 100.202 to support their position. Also see HUD/DOJ Statement on Reasonable Accommodation, Question 16, pages 11-12; HUD Handbook 4350.3, paragraph 2-31E, Owners Must Not Make Certain

Inquiries to Determine Eligibility on p. 2-27, paragraph 4-8E, Criteria That Inquire About Disabled Status on page 4-26, Verification of preferences, par. 4-26 on page 4-56 and paragraph 4-29, Verifying The Need for Accessible Units on page 4-62; HUD/DOJ Statement on Reasonable Modification, pages 4-6. HUD/DOJ Statement on Reasonable Accommodation, pages 11-14.

Also see *Murray v. New York City Housing Authority*, No. 4226819, (N.Y. Sup. Ct. June 1994) (Settlement Agreement); *Milligan v. Lakeland Owners Corp.* FH-FL Rptr. ¶16,305, No. C96-20504 (N.D. Cal. Aug. 27, 1998); *Campbell v. Minneapolis Pub. Housing Authority*, 1997 U.S. Dist. LEXIS 14334 (D. Minn. 1997). *Robards v. Cotton Mill Associates*, 677 A.2d 540 (Maine 1996).

11. This particular inquiry was the focus of litigation in *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990). There is also a HUD memo discussing this case and other inquiries. G.H. Mansfield, HUD Asst. Sec. for Fair Housing and Equal Opportunity, to HUD Regional Administrators and Directors (12/21/90). Also see a more recent case, *Niederhauser v. Independence Square Housing*, FH-FL Rptr. ¶16,305, No. C 96-20504 (N.D. Cal. Aug 27, 1998). Also see HUD Handbook 4350.3, paragraph 2-31E4, page 2-27 and PIH Nondiscrimination Notice, pg. 15 and PIH Accessibility Notice, p.15 and HUD Handbook 4350.3 Rev-1, Par. 2-31 E.4. The focus must be on whether an applicant will comply with the terms of the lease; not on whether someone can “live independently”. Please note that an exception to this inquiry is for programs contained in Figure 3-5: Applicable Definitions for Elderly and Disability beginning on pg. 3-46 which utilize Definition E in Figure 3-6: Applicable Definitions of Elderly and Disability - Determining Project Eligibility, beginning on pg. 3-48. The term independent living is part of this eligibility definition. To verify a person’s disability when required for eligibility (or to determine an income deduction based on disability for the purpose of calculating adjusted income and rent in accordance with the rules contained in HUD Handbook 4350.3 Rev-1), please see **Appendix 6-B: Verification of Disability - Instructions to Owners and Sample Formats**.
12. HUD/DOJ Statement on Reasonable Modification, pages 5-6. HUD/DOJ Statement on Reasonable Accommodation, pages 11 - 12.

13. Id, at pages 4-5 and 13-14, respectively. To verify a person's disability when required for eligibility (or to determine an income deduction based on disability for the purpose of calculating adjusted income and rent in accordance with the rules contained in HUD Handbook 4350.3 Rev-1), please see **Appendix 6-B: Verification of Disability - Instructions to Owners and Sample Formats**. Also see HUD Handbook 4350.3 Rev-1, Par. 4-26 B.4.d. on pg. 4-56 (preferences) and Par. 4-29, beginning on pg.4-62 (Accessible Units and Preferences). Also see Par. 3-28B beginning on pg. 3-76 (meeting the eligibility definition of disability).
14. PIH Accessibility Notice, page 13-14 and PIH Non Discrimination Notice, pg. 13-14. Also see HUD Handbook 4350.3, paragraph 2-32(F)(1)(b); and HUD Handbook 4350.3, Appendix 6-B, Verification of Disability – Instructions to Owners and Sample Formats.
15. HUD/DOJ Statement on Reasonable Modification, pages 5-6. HUD/DOJ Statement on Reasonable Accommodation, pages 13-14, and HUD Handbook 4350.3, paragraphs 4-29, Verifying the Need for Accessible Units, and 4-30, Addressing Requests for Reasonable Accommodations, pages 4-62 and 4-63, and Chapter 2, Subsection 4, Reasonable Accommodations, beginning on page 2-36.
16. HUD Handbook 4350.3, Figure 5-5, Language Required in all Consent Forms, p.5-59.
17. HUD Handbook 4350.3, paragraph 2-31E, Owners Must Not Make Certain Inquiries to Determine Eligibility on p. 2-27, paragraph 4-8E, Criteria That Inquire About Disabled Status on page 4-26, and paragraph 4-29, Verifying The Need for Accessible Units on page 4-63; HUD/DOJ Statement on Reasonable Modification, pages 4-6. HUD/DOJ Statement on Reasonable Accommodation, pages 11-14.
18. The definition of a person with a disability is the same for these two programs. 42 U.S.C. 1382(a)(3)(A); 42 U.S.C. 416(l)(1). A person would qualify as a person with a disability for the SSI or SSDI program if s/he were: unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months (or, in the case of a child under eighteen (18), if s/he has a medically determinable physical or

mental impairment of comparable severity). HUD Handbook 4350.3, paragraph 3-28(B)(2 & 3), page 3-76. NOTE: Receipt of veteran's disability benefits doesn't automatically qualify a person as disabled under HUD programs because the VA's and SSA's definition of disability are different. Also see PIH Nondiscrimination Notice, pg. 14 and PIH Accessibility Notice, p.14 and Chapter 4 of the *Public Housing Occupancy Guidebook* (June 2003). Also, please see **Figure 3-5: Applicable Definitions for Elderly and Disability - Determining Project Eligibility Summary Type** for a list of which programs utilize which definition of disability and **Figure 3-6: Applicable Definitions of Elderly and Disability - Determining Project Eligibility** for the specific definitions. Also, please note that "Because the Disability Status in EIV is not always accurate, owners must not use this status for determining an applicant's or tenant's eligibility as disabled for a HUD program or for receiving the elderly/disabled household allowance. Owners must obtain current tenant-provided documentation, or verification directly from the Social Security office to determine whether an applicant or tenant meets their definition as disabled for programs listed in Figure 3-5 that use definition E for person with disabilities." See the Note on pg. 3-76.

19. HUD Handbook 4350.3, Appendix 6-B, Verification of Disability – Instructions to Owners and Sample Formats. HUD Handbook 4350.3, paragraph 3-28(B)(1), page 3-76.
20. HUD Handbook 4350.3, Figure 5-5, Language Required in all Consent Forms, page 5-59.
21. A number of cases illustrate that there must be a connection between a person's disability and the need for the accommodation. See *Grubbs v. Housing Auth. of Joliet*, No. 91-C-6454, 1997 U.S. Dist. LEXIS 7294 (N.D. Ill. May 19, 1997); *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995); *Schanz v. Village Apartments*, 998 F. Supp. 784 (E.D. Mich. 1998). Also see HUD/DOJ Statement on Reasonable Modification, pages 4-6. HUD/DOJ Statement on Reasonable Accommodation, pages 13-14. Chapter 2, Subsection 4, Reasonable Accommodations, beginning on page 2-36.
22. HUD Handbook 4350.3, Figure 5-5, Language Required in all Consent Forms, page 5-59.

23. Although nothing in the language of the Fair Housing Amendments Act explicitly imposes confidentiality requirements, it is clear from its legislative history that Congress intended to impose some confidentiality requirements on housing managers. See H.R. Rep. No. 711, 100th Cong., 2nd Sess. 30 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2191. The requirement to keep confidential disability related information obtained in the context of the reasonable accommodation process is explicitly stated in the HUD/DOJ Joint Statement on Reasonable Accommodation, Question 18, pg. 14 and HUD/DOJ Joint Statement on Reasonable Modification, Question 6, pg. 5. Also see HUD Handbook 4350.3, paragraph 5-19, Confidentiality of Applicant and Tenant Information , page 5-62.
24. 5 U.S.C. §552a. The federal Privacy Act established standards that govern how federal agencies can collect, maintain, use, and disseminate any system of records that retrieves data by someone's name or by some identifier assigned to the individual. The federal Privacy Act prohibits a government agency for disclosing any information from a system of records without a written consent of the subject individual, unless the disclosure is otherwise permitted by law. This law is extremely important for those who work at sites that were financed with money (loans or subsidy) from the Department of Housing and Urban Development (HUD) or another federal government agency. In general, it limits the information owners/managing agents can collect about an applicant or tenant to only information that is necessary to determine eligibility and level of assistance. It also establishes the responsibility of owners/managing agents and their employees (including Resident Service Coordinators) to use information provided by applicants and tenants only for specified program purposes and to prevent the use or disclosure of this information for other purposes. HUD takes the privacy act very seriously, which is why owners/managing agents must provide adult applicants and residents with a verification packet, commonly referred to as the 9887 packet, at move in and at recertification. This packet includes a fact sheet explaining the Federal Privacy Act (which can be found in Exhibit 5-7), a release of information which permits government agencies to share information (form HUD-9887, Notice and Consent for the Release of Information to HUD and to a PHA), and a form which allows owners to request and receive information from third-party sources about the applicant

or tenant (form HUD-9887-A, Applicant's/Tenant's Consent to the Release of Information Verification by Owners of Information Supplied by Individuals Who Apply for Housing Assistance). Exhibit 5-5 contains a copy of form HUD-9887 and Exhibit 5-6 contains a copy of form HUD-9887-A. Each member of a family who is at least 18 years of age and each family head, spouse or co-head, (regardless of age), must sign and date the consent forms (form HUD-9887, Notice and Consent for the Release of Information to HUD and to a PHA and form HUD-9887-A, Applicant's/Tenant's Consent to the Release of Information Verification by Owners of Information Supplied by Individuals Who Apply for Housing Assistance) at the initial certification and at each recertification. Additional signatures must be obtained from new adult members when they join the household. The owner must also address, in their Policies and Procedures, notification requirements and timeframes for tenants who turn 18 between annual recertifications to sign the consent forms, if requiring the forms to be signed other than at recertification. Form 9887 allows HUD or a public housing agency to verify information with the Internal Revenue Service *(IRS), the Social Security Administration (SSA), the Department of Health and Human Services (HHS') National Directory of New Hires (NDNH), and with state agencies that maintain wage and unemployment claim information (SWICAs). Form 9887-A allows owners to request and receive information from third-party sources about the applicant or tenant. Failure to sign the 9887 and 9887-A is a basis for the denial of assistance and termination of assisted housing benefits. Unless these forms are properly signed and dated, an owner/manager is prohibited from obtaining third party verifications or accessing most information from other government agencies. For example, a current form HUD-9887 be on file before owners access the EIV employment and income information for a tenant, including one who turns 18 between certifications. It does not have to be on file to use the EIV Verification Reports, which includes the Existing Tenant Search for applicants. For information on the 9887 and 9887-A see HUD Handbook 4350.3, Par. 3-11. Beginning on pg. 3-23 and Par. 5-15 Required Verification and Consent Forms, beginning on pg. 5-57. The Handbook summarizes the Owner's obligation to keep information confidential in Par. 5-19 Confidentiality of Applicant and Tenant Information , beginning on pg. 5-62. Also see NOTICE PIH-2015-06, U.S. Department of

Housing and Urban Development (HUD) Privacy Protection Guidance for Third Parties, April 23, 2015.

25. Massachusetts has a very comprehensive statute and implementing regulations that apply to the protection of personal information of all residents of MA (RESIDENTS OF THE COMMONWEALTH, implement the provisions of M.G.L. c. 93H, Security Breaches) as well as a statute that covers privacy in general (M.G.L. c. 214, Section 1B: Right to Privacy). In addition, MA law imposes clear requirements regarding individuals in professions where confidentiality is an essential element, such as licensed social workers. See M.G.L c.112, §135A.

In accordance with the Massachusetts personal information law, companies were required to develop, implement, maintain and monitor a comprehensive written information security program to ensure the security and confidentiality of personal information in both physical and electronic format by January, 2010. Personal information includes the resident's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to the person: a) social security number; b) driver's license number or state-issued identification card; or c) financial account number or credit or debit card number. It doesn't include information that's lawfully obtained from public information or records. It is crucial that you comply with your company's policy, which presumably covers all of the requirements of the law. M.G.L. c. 93H, 201 CMR 17.00: Standards for The Protection of Personal Information of Residents of the Commonwealth, and M.G.L. c. 66A, 751 C.M.R. 7.00 et seq.

26. Section 504 Frequently Asked Questions, HUD FHEO website at <http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm>. (Hereinafter referred to as 504 Questions): **Question: How are recipients supposed to deal with the following fire emergency issues in a high-rise building:**
(1) If a HUD recipient cannot control where persons with disabilities live, during a fire, how do these tenants escape from a 14th floor unit?
(2) If a HUD recipient cannot give out a list of where persons with disabilities live, how do rescue teams know where to go?
27. Id Guidance on this subject can also be found from the U.S. Equal Employment Opportunity Commission. This government entity, which is

responsible for enforcing prohibitions of employment discrimination against people with disabilities, posted on its web site questions and answers to assist employers on employee emergency evacuation plans. However, this guidance indicates that it is permissible for an employer to ask employees with obvious disabilities if they need assistance, whether the employer periodically surveys all of her employees or not. <http://www.eeoc.gov/facts/evacuation.html> Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures HUD's guidance on this topic doesn't indicate that this would be acceptable in the housing context. Other resources are [Accommodation and Compliance Series: Employers' Guide to Including Employees with Disabilities in Emergency Evacuation Plans](#), updated 09/12/11, at <http://www.jan.wvu.edu/media/emergency.html>. Also see [Emergency Preparedness for People with Disabilities](#) at <http://s3.amazonaws.com/reeve-assets-production/Emergency-Preparedness-for-PWD-12-15.pdf> Provides a summary of resources on this topic.

28. The Housing Opportunity Program Extension Act, P.L. 104-120, March 28, 1996. This law amended sections 6 and 16 of the United States Housing Act of 1937. 24 C.F.R. Part 982.553, **Denial of admission and termination of assistance for criminals and alcohol abusers.**
29. Sections 428, 506, 545 and 575-579 of the HUD Appropriation Act for Fiscal Year 1999 (Pub. L. 105-276, approved Oct. 21, 1998) AMENDED SECTIONS 3, 6,8, AND 16 OF THE 1937 Act and created other statutory authority concerning crime and security provisions in most federally assisted housing (42 U.S.C. 13661-13664) Title V of the HUD Appropriation Act for fiscal year 1999 (Pub. L. 105-276, approved October 21, 1998) was designated The Quality Housing and Work Responsibility Act (QHWRA). Section 903 of the Personal Work Responsibility Act of 1996 (Pub. L. 104-193, approved August 22, 1996), amended sections 6(1) and 8(d)(1) of the 1937 Act concerning terminating tenancy for fleeing to avoid prosecution, custody or confinement after commission of a felony, or for violation of probation or parole. See HUD Handbook 4350.3, Par. 4-7 C, Screening for Drug Abuse and Other Criminal Activity, beginning page 4-19.
30. Final Screening Rule

31. See HUD Handbook 4350.3, Par. 4-7C, Screening for Drug Abuse and Other Criminal Activity, beginning page 4-19.
32. The definition of a controlled substance and what constitutes illegal drug use is contained in the Controlled Substance Act (CSA), 21 U.S.C. Section 801 et.seq.
33. 24 CFR part 5, subpart I – Preventing Crime in Federally Assisted Housing Denying Admission and Terminating Tenancy for Criminal Activity and Alcohol Abuse
34. Current illegal drug users, including individuals who use medical marijuana, are excluded from the definition of “individual with a disability” under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, when the housing provider acts on the basis of the illegal drug use. The Fair Housing Act’s exclusion regarding illegal drug use is different. The term “handicap” under the Fair Housing Act does not categorically exclude people who currently illegally use a controlled substance. Rather, it prohibits someone from claiming that illegal drug use is in and of itself a basis for claiming that he or she has a disability under the act. Illegal drug use is defined in reference to the Controlled Substance Act (CSA), 21 U.S.C. Section 801 et.seq, which categorizes marijuana as a Schedule 1 substance, which means that the manufacture, distribution or possession of marijuana is a criminal offense. However, because someone with a disability may be using medical marijuana, HUD has considered and rejected whether accommodating someone’s use of medical marijuana is reasonable. Rather, it has taken the position that accommodations allowing the possession, use, cultivation or distribution of medical marijuana constitute a fundamental alteration in public and assisted housing program’s longstanding goal of providing decent, safe and sanitary housing that is free of illegal drugs and would also violate federal law. In addition, HUD has taken the position that federal law would pre-empt any state fair housing law requiring otherwise even in states, such as Massachusetts, which has a medical marijuana statute. For more information see HUD’s memorandum, written by Helen Kanovsky, titled “Medical Use of Marijuana and Reasonable Accommodation in Public and Assisted Housing, January 20, 2011. Also see HUD’s Memorandum, written by Ben Metcalf, titled “Use of Medical Marijuana in Multifamily Assisted Housing”, December 29, 2014. Please note that M.G.L.

c. 151B, Section 1 (14) uses comparable language to the Federal Fair Housing Act, but states that controlled substance is defined under state law, chapter ninety-four C. This law utilizes the federal classifications, although has taken a different approach to both possession of marijuana of one ounce or less (M.G.L.c. 94C, Section 32N) and use of marijuana for medical purposes. Massachusetts state law, Chapter 369 of the Acts of 2012 (the Act) allows individual who qualify due to a “debilitating medical condition” to obtain and use marijuana for medicinal use provided the person has obtained a written certification from a physician with whom the patient has a bona fide physician-patient relationship. The statute and implementing regulations provide a debilitating medical conditions are defined as: “Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis and other conditions as determined in writing by a qualifying patient's physician.” (Section 2.(C) of the Statute .and at 105 CMR 725.004). Effective February 1, 2015, paper certifications from physicians are not sufficient for compliance with registration requirements under DPH Marijuana Regulations. **All** patients are required to obtain an *electronic* certification from their physician stating the patient’s specific debilitating medical condition and symptoms, as well as that the potential benefit of the medical use of marijuana outweighing any associated health risks for the patient *and* be registered with the Medical Use of Marijuana Program to possess marijuana for medical use. The law and its implementing regulations, which can be found at 105 CMR 725 specify the limits of possession and the circumstances under which a qualifying patient or caregiver is permitted to cultivate plants to for the patient’s personal use, as well as the parameters for the quantity for that growth. This is referred to as “home-cultivation” or the “hardship waiver”.

The law and its implementing regulations do not give immunity under federal law or obstruct federal enforcement of federal law. Section 6 (F) and 105 CMR 725.650 provide that nothing in this law requires the violation of federal law or purports to give immunity under federal law. For more information on Massachusetts State law, please see <http://www.mass.gov/eohhs/gov/departments/dph/programs/hcq/medical-marijuana/>

35. HUD/DOJ Statement on Reasonable Accommodation, beginning page 11. Also see HUD Handbook 4350.3, Par. 4-8, Prohibited Screening Criteria, beginning page 4-25.
36. 28 C.F.R. §35.104, 28 C.F.R. §36.104.
37. See the HUD Handbook 4350.3, **Definition for Currently Engaging** in the Glossary, page 6, which cites 24 CFR 5.853 (which originated in the Final Screening Rule).
38. H.R. Cong. Rep. No. 101-596, 101st Cong., 2nd Sess. 88-9, reprinted in 1990 U.S.C.C.A.N., 597-598.
39. *United States v. Southern Management Corp.*, 955 F.2d 914, 923 [4th Cir., 1992]. In *Peabody Properties v. Sherman*, 638 N.E.2d. 906 (MASS.1994) an eviction was upheld on the ground that the tenant's one-month old conviction for possession of marijuana with intent to distribute was "current." The decision, although confusing, reaches the result that the law is intended to protect people with disabilities, not people engaged in criminal activity.
40. M.G.L. c. 121B, Section 40(h), 760 CMR 49.03(2)(k); 760 CMR 5.08(1)(k).
41. HUD Handbook 4350.3, Screening For Drug Abuse And Other Criminal Activity paragraph 4-7 C. 3. c., p.4-19.
42. HUD Handbook 4350.3, Screening For Drug Abuse And Other Criminal Activity paragraph 4-7 C. 2. d., p.4-19.
43. 24 CFR §960.205.
44. 24 CFR §960.205(e).
45. 24 CFR §960.205(f). The regulation provides that the information:
 - (1) Is maintained confidentially in accordance with section 543 of the Public Health Service Act ([12 U.S.C. 290dd-2](#));
 - (2) Is not misused or improperly disseminated; and
 - (3) Is destroyed, as applicable:

This must occur:

 - “(i) Not later than 5 business days after the PHA makes a final decision to admit the person as a household member under the PHA's public housing program; or
 - (ii) If the PHA denies the admission of such person as a household member, in a timely manner after the date on which the statute of limitations for the

- commencement of a civil action based upon that denial of admissions has expired without the filing of a civil action or until final disposition of any such litigation. “
46. 24 CFR §960.205(d)(5).
 47. HUD Handbook HUD Handbook 4350.3, **Considerations In Developing Screening Criteria**, paragraph 4-7 E.2 beginning page 4-22. The only exception in regards to the costs of screening relates to cooperatives. A cooperative may pass on the cost of a credit check.
 48. See Screening and Eviction for Drug Abuse and Other Criminal Activity, Final Rule, May 24, 2001; 24 CFR Part 960.204-Admission to and Occupancy of Public Housing, 24 C.F.R. Part 982.553 and HUD Handbook 4350.3, Screening for Suitability, paragraph 4-7 C, beginning p. 4-19.
 49. Final Screening Rule, Subpart J, Access to Criminal Records and Information, 24 CFR §5.901-5.905.
 50. See HUD Handbook 4350.3, **Screening for Drug Abuse and Other Criminal Activity**, paragraph 4-27 E, beginning page 4-59, **Considerations In Developing Screening Criteria**, paragraph 4-7 D.2 beginning page 4-21 and Drug Abuse and Other Criminal Activity, paragraph 8-14, beginning p.8-17 involving eviction. Also see 24 CFR subpart J, Section 5.903.
 51. See HUD Handbook 4350.3, **Screening for Drug Abuse and Other Criminal Activity**, paragraph 4-27 E 5. and 6., beginning page 4-59.
 52. The Department of Criminal Justice Information Services (DCJIS) website which contains information regarding MA CORI may be found at: <http://www.mass.gov/eopss/crime-prev-personal-sfty/bkqd-check/cori/>
 53. See M.G.L. c.6, § 172. Also see the applicable regulations at 803 CMR 5.05(4), which provides “a property management company that administers a subsidized housing program for qualifying subsidized housing units that also manages or owns market rate housing shall not use access to CORI pursuant to 803 CMR 2.05(3): Levels of Access to Criminal Offender Record Information to evaluate housing applicants for market rate housing. Such property management companies may access CORI pursuant to 803 CMR 2.05(4): Levels of Access to Criminal Offender Record Information to evaluate housing applicants for market rate housing,” which is standard access to CORI information. Based on conversation with a representative of

the DCJIS, this means that at a mixed site (one with subsidized and market units) the higher level of CORI access may only be used for the subsidized units. Before applying different standards for different tenants at the same site, please consult with your attorney.

M.G.L. c.6, § 172

54. 803 CMR 5.00: CRIMINAL OFFENDER RECORD INFORMATION (CORI) – HOUSING,
55. See 803 C.M.R. 5.11: Required Dissemination of Criminal Offender Record Information (CORI) or other Criminal History Information by a Landlord, Property Management Company, Real Estate Agent, or Public Housing Authority; 803 C.M.R. 5.12: Permissive Dissemination of Criminal Offender Review Information (CORI) by a Landlord, Property Management Company, Real Estate Agent, or Public Housing Authority. Some of these requirements are also contained in M.G.L. c.6, § 172.
56. 803 C.M.R. 5.11 (1). Also see 803 C.M.R. 5.15: Adverse Housing Decision Based on Criminal Offender Record Information (CORI). This requirement is also contained in M.G.L. c.6, § 172 (c).
57. 803 C.M.R. 5.16: Use of a Consumer Reporting Agency (CRA) to Make Housing Decisions
58. 803 C.M.R. 5.09 (1)-(3)
59. 803 C.M.R. 5.09 (4)
60. 803 C.M.R. 5.10: Destruction of Criminal Offender Record Information (CORI)
61. The term, reliable, is used to make sure that housing providers base their decisions on objective, credible information. For example, if the applicant reveals information indicating that s/he may be a current illegal user of a controlled substance, this would be credible. Likewise, if a current landlord's reference reveals that the applicant is a current illegal user of a controlled substance, you may require the applicant to document that s/he is not.
62. Current illegal drug users, including individuals who use medical marijuana, are excluded from the definition of "individual with a disability" under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, when

the housing provider acts on the basis of the illegal drug use. The Fair Housing Act's exclusion regarding illegal drug use is different. The term "handicap" under the Fair Housing Act does not categorically exclude people who currently illegally use a controlled substance. Rather, it prohibits someone from claiming that illegal drug use is in and of itself a basis for claiming that he or she has a disability under the act. Illegal drug use is defined in reference to the Controlled Substance Act (CSA), 21 U.S.C. Section 801 et seq, which categorizes marijuana as a schedule 1 substance, which means that the manufacture, distribution or possession of marijuana is a criminal offense. However, because someone with a disability may be using medical marijuana, HUD has considered and rejected whether accommodating someone's use of medical marijuana is reasonable. Rather, it has taken the position that accommodations allowing the possession, use, cultivation or distribution of medical marijuana constitute a fundamental alteration in public and assisted housing program's longstanding goal of providing decent, safe and sanitary housing that is free of illegal drugs and would also violate federal law. In addition, HUD has taken the position that federal law would pre-empt any state fair housing law requiring otherwise even in states, such as Massachusetts, which has a medical marijuana statute. For more information see HUD's memorandum, written by Helen Kanovsky, titled "Medical Use of Marijuana and Reasonable Accommodation in Public and Assisted Housing, January 20, 2011. Also see HUD's Memorandum, written by Ben Metcaff, titled "Use of Medical Marijuana in Multifamily Assisted Housing", December 29, 2014. Please note that M.G.L. c. 151B, Section 1 (14) uses comparable language to the Federal Fair Housing Act, but states that controlled substance is defined under state law, chapter ninety-four C. This law utilizes the federal classifications, although has taken a different approach to both possession of marijuana of one ounce or less (M.G.L.c. 94C, Section 32N) and use of marijuana for medical purposes. Massachusetts state law, Chapter 369 of the Acts of 2012 (the Act) allows individual who qualify due to a "debilitating medical condition" to obtain and use marijuana for medicinal use provided the person has obtained a written certification from a physician with whom the patient has a bona fide physician-patient relationship. The statute and implementing regulations provide a debilitating medical conditions are defined as: "Cancer, glaucoma, positive status for human immunodeficiency virus, acquired

immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis and other conditions as determined in writing by a qualifying patient's physician.” (Section 2.(C) of the Statute .and at 105 CMR 725.004). Effective February 1, 2015, paper certifications from physicians are not sufficient for compliance with registration requirements under DPH Marijuana Regulations. **All** patients are required to obtain an *electronic* certification from their physician stating the patient’s specific debilitating medical condition and symptoms, as well as that the potential benefit of the medical use of marijuana outweighing any associated health risks for the patient *and* be registered with the Medical Use of Marijuana Program to possess marijuana for medical use. The law and its implementing regulations, which can be found at 105 CMR 725 specify the limits of possession and the circumstances under which a qualifying patient or caregiver is permitted to cultivate plants to for the patient’s personal use, as well as the parameters for the quantity for that growth. This is referred to as “home-cultivation” or the “hardship waiver”.

The law and its implementing regulations do not give immunity under federal law or obstruct federal enforcement of federal law. Section 6 (F) and 105 CMR 725.650 provide that nothing in this law requires the violation of federal law or purports to give immunity under federal law. For more information on Massachusetts State law, please see <http://www.mass.gov/eohhs/gov/departments/dph/programs/hcq/medical-marijuana/>

63. See HUD Handbook 4350.3, **Screening For Drug Abuse And Other Criminal** Activity paragraph 4-7 C beginning on page 4-19 and **Screening for Drug Abuse and Other Criminal Activity**, paragraph 4-27 E, page 4-59 Also see 24 CFR Par 5 et al., Subpart I: Preventing Crime in Federally Assisted Housing-Denying Admission and Terminating Tenancy for Criminal Activity and Part 960-Admission to and Occupancy of Public Housing.
64. See HUD Handbook 4350.3, paragraph 4-7, Screening for Suitability, page 4-17, Prohibited Screening Criteria, paragraph 4-8 A and B, page 4-25.
65. See M.G.L. c. 121B, Section 40(h) and 760 CMR 49.03(2)(k); 760 CMR 5.08(1)(k)

66. See HUD Handbook HUD Handbook 4350.3, Consideration of extenuating circumstances in the screening process. Paragraph 4-7 F.6, page 4-24 and **Extenuating Circumstances**, paragraph 4-28B., page 4-62.
67. Standards for PHA tenant selection criteria, 24 CFR Section 960.203 (d) (1).
68. PIH Non-Discrimination Notice, Screening/Reasonable Accommodations, p. 25 and PIH Accessibility Notice, Screening/Reasonable Accommodations, p.22-23.
69. M.G.L. c. 121B, Section 32.
70. 24 CFR §5.854, and 24 CFR §960.204.
71. Id. This example has also been incorporated into the 4350.3 Rev-1 in paragraph 4-7 C.2.(a)2., on pg.4-19.
72. Please see <http://www.mass.gov/eopss/agencies/sorb/> for information on requirements regarding sex offender registration in Massachusetts.
73. See HUD Handbook 4350.3, paragraph 4-9C.2., page 4-28
74. See MassHousing's Tenant Selection Plan, RENTAL SUBSIDY VERSION **(12/13)** pg. 13 and **Tenant Selection Plan - Mixed-Income Portfolio Version (12/13) pg.13**; PIH Non-Discrimination Notice, Screening/Reasonable Accommodations, p. 25; PIH Accessibility Notice, Screening/Reasonable Accommodations, p. 22 and HUD Handbook 4350.3, Notification of Applicant Rejection, Section 4-9 C.2., page 4-28.
75. Establishing the nexus between the disability, bad tenancy history, and reasonable accommodation is essential. See *Schanz v. Village Apartments*, 998 F.Supp. 784 (E.D. Mich. 1998). Although establishing the nexus is required for a reasonable accommodation, the applicant does not have to establish this nexus if you would let someone who does not have a disability into your housing with the same history as the applicant. You must be consistent in your standards. See *Neihamer v. Brenneman Property Services, Inc.*, 81 F.Supp. 2d 1 (D.D.C. 1999) and HUD Handbook 4350.3, **Permitted Screening Criteria Commonly Used by Owners** Par.4-7 F., beginning page 4-23 and Paragraph 4-8 Prohibited Screening Criteria, beginning page 4-25.
76. HUD Handbook 4350.3, Language Required in all Consent Forms, p.5-59.
77. Final Screening Rule, 24 CFR Sections 5.856 882.518 (a)(2), and 960.204(a)(4).

78. Id and HUD Handbook 4350.3, **Screening For Drug Abuse And Other Criminal Activity** paragraph 4-7 C, beginning page 4-19 and 4-27 E, beginning on page 4-59.
79. Final Screening Rule, 24 CFR Sections 5.856 882.518 (a)(2), and 960.204(a)(4).
80. 24 CFR 882.518(a)(1)(B)(ii) and (2); 960.204(a)(3).
81. See 24 CFR Section 5.855, Section 882.518 and Section 960.204. Also see HUD Handbook 4350.3, **Screening For Drug Abuse And Other Criminal Activity** paragraph 4-7 C., beginning on page 4-19.
82. See PIH Nondiscrimination Notice, Screening/Reasonable Accommodation, pg 25 and PIH Accessibility Notice, Screening/Reasonable Accommodation, p.22 and HUD Handbook 4350.3, Consideration of extenuating circumstances in the screening process, paragraph 4-7 F.6., page 4-24.
83. Final Screening Rule, Section 882.518(a)(1)(B)(ii) and (2); 960.204(a)(3) and 24 CFR 960.204(a)(3) and 24 CFR 982.553(a)(ii)(C).
84. See *Roe v. Sugar River Mills Assoc.*, 820 F.Supp. 636(D.N.H.1993) Please note that in *Peabody Props., Inc. v. Sherman*, 418 Mass. 603 (1994) the Supreme Court in Massachusetts made it clear that a tenant engaged in ongoing and current illegal drug activity was not protected because he was a current illegal drug user and the illegal drug activity in which Sherman engaged is the FHAA's sole exclusion from the definition of handicap. Presumably as such, you would likewise not have to admit someone "currently" engaging in the illegal use of a controlled substance.
85. PIH Nondiscrimination Notice, page 23 and PIH Accessibility Notice, page 20, states, "all application offices must be accessible." There is no mention of undue burden, which contradicts HUD's §504 regulations and the HUD Handbook 4350.3, **Overview of Key Requirements**, paragraph 2-25 A.4 and C., page 2-19 and **Owners' Requirements for Providing Physical Accessibility**, paragraph 2-35 D., page 2-34. Also remember that Title III of the ADA is applicable because a management office is considered a public accommodation, which requires the removal of all readily achievable barriers. See 28 CFR §36.304.

86. See HUD Handbook 4350.3, **Example-When Owners Must Make Reasonable Accommodations**, page 2-39.
87. Auxiliary aids and services are steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently. The term includes the equipment for individuals necessary to make orally delivered information available to individuals with hearing impairments or to make visually delivered information available to individuals with visual impairments.
88. 24 C.F.R. Subtitle A §8.6(a)(1); 28 C.F.R. Subtitle E §35.160(b)(1); 28 CFR §36.303; PIH Non Discrimination Notice, Effective Communication/Provision of Auxiliary Aids & Services, page 23; PIH Accessibility Notice, Effective Communication/Provision of Auxiliary Aids & Services, beginning on page 20 and HUD Handbook 4350.3, **Communications with Persons with Disabilities**, paragraph 2-29, beginning on page 2-23 and Exhibit 2-2, Examples of Requests for Auxiliary Aids and Reasonable Accommodations by Persons with Disabilities, pages 2-49 and 2-50.
89. Id.
90. 24 C.F.R. Subtitle A §8.6(a)(1)(I). Also see PIH Non Discrimination Notice, Effective Communication/Provision of Auxiliary Aids & Services, page 23, PIH Accessibility Notice, Effective Communication/Provision of Auxiliary Aids & Services, page 21 and HUD Handbook 4350.3, **Communications with Persons with Disabilities**, paragraph 2-29 C., page 2-24.
91. Each state law also requires housing providers to do certain things. For example, in Massachusetts, housing authorities where necessary must provide assistance in completing applications for state public housing, including mailing an application when requested and making a visit to the home of the applicant if the circumstances require it. 760 CMR §5.05, **Procedure Following Application**
92. See 24 CFR, part 1 Title VI of the Civil Rights Act of 1964, **Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons**, *Federal Register* / Vol. 72, No. 13 / Monday, January 22, 2007. Also please note that the Rural Development published

their guidance Federal Register, Vol. 79, No. 229, Friday, November 28, 2014

93. See HUD Handbook 4350.3, paragraph 4-7E.6., page 4-24, PIH Non-Discrimination Notice, Screening/Reasonable Accommodations, p. 25 and PIH Accessibility Notice, Screening/Reasonable Accommodations, p.22-23.
94. In settlement negotiations, the housing provider in *Cason v. Rochester Housing Authority*, 748 F..Supp. 1002 (W.D.N.Y., 1990) agreed to provide a second interview for individuals with disabilities who would have failed the screening.
95. See 24 CFR 982.204 (c) (2). This regulation cites HUD's Section 504 regulations, 24 CFR Part 8. Please note that the failure to respond to requests for information or updates must be connected to the applicant's disability. A housing provider is not required by this provision to put someone with a disability back on the waiting list when they fail to respond unless the failure is a result of a disability.
96. See 24 CFR 982.301 (b) (12).
97. 24 CFR 982.303 (b) (2); This regulation cites HUD's Section 504 regulations, 24 CFR Part 8. In accordance with this provision, "If the family needs and requests an extension of the initial voucher term as a reasonable accommodation, in accordance with part [8 of this title](#), to make the program accessible to a family member who is a person with disabilities, the PHA must extend the voucher term up to the term reasonably required for that purpose." It doesn't define reasonably required. Also see PIH Non Discrimination Notice, page 9 and PIH Accessibility Notice, page 6.
98. 24 CFR 982.306 (d), and section 982.615(b)(3). This provision doesn't apply to shared housing. Also see PIH Non Discrimination Notice, page 20 and PIH Accessibility Notice, page 17.
99. 24 CFR 982.316(a) and see §982.402(b)(6), as well as §982.615(b), which applies to shared housing. The regulations cite HUD's Section 504 regulations, 24 CFR Part 8. They make it clear that PHAs can refuse under certain circumstances to approve certain individuals, or withdraw such approval. Examples listed include if the person committed fraud, larceny or other type of criminal act in connection with a federal housing program, if the person committed drug related or violent criminal behavior or the person

currently owes money to the PHA or another PHA in connection with the Section 8 or Public Housing program. Also see PIH 2014-25 (HA), **Over Subsidization in the Housing Choice Voucher Program**, October 16, 2014, which cross references Notice PIH 2010-51 and explains subsidy standards for the Housing Choice Voucher Program in regard to live-in aides and their PHA-approved family member/s and data entry in IMS/PIC for family members of live-in aides.

100.24 CFR §982.503(c)(2)(ii) and 24 CFR §982.505(d); Also see PIH Nondiscrimination Notice, page 19 and PIH Accessibility Notice, page 17. The HUD Field Office may approve between 110-120% of the FMR if required. Any exception would be granted after the family locates a unit if needed as a reasonable accommodation. If an exception standard above 120% is needed as a reasonable accommodation, the request must be submitted to HUD Headquarters for regulatory waiver and approval. In addition see Notice PIH 2013-18, Subject: Revision for Requests for Exception Payment Standards for Persons with Disabilities as a Reasonable Accommodation. This notice provides guidance to public housing agencies (PHAs) on the process for review and approval of exception payment standards for vouchers as a reasonable accommodation for people with disabilities. It supersedes Notice PIH 2011-19, Requests for Exception Payment Standards for Persons with Disabilities as a Reasonable Accommodation, (which extended Notice PIH 2010-11). Prior to this revision, public housing agencies (PHA) were informed that an exception payment standard **may** remain in effect until or unless a higher exception payment standard was warranted, requested, and subsequently approved. Now, exception payment standards “must” remain in effect until or unless a higher exception payment standard is warranted, requested, and subsequently approved.

101.24 CFR 982.517(e);

102.24 CFR 982.552(c)(2)(iv).

103. See 24 CFR 982.152(a)(i)(3)(A).

104. This is explicitly stated in PIH Non Discrimination Notice, page 25 and PIH Accessibility Notice, page 23, and in 24 CFR 966.7. The HUD Handbook 4350.3 states that at the interview the owner must inform the applicant she

doesn't discriminate on the basis of disability. The paragraph states that this includes the provision of reasonable accommodation. See paragraph 4-24, #14, page 4-49. It is good business practice to provide this notice at recertification.

105. See Frequently Asked Questions and Joint Memo on Reasonable Accommodations, questions # 12, page 10 and 14, page 11 and Joint Memo on Reasonable Modifications, question #15, page 9.

106. *Cobble Hill Apt. Co. v. McLaughlin*, 1999 Mass. App. Div. 166 (N. Dist. Middlesex); *Rodecki v. Joura*, 114 F.3d 115 (8th Cir. 1997). The Appeals Court in *McLaughlin* stated that the housing provider, although aware of the tenant's mental health problems and of the nexus between her disability and negative tenancy related behavior, did not make enough effort in accommodating the person before initiating eviction procedures. The court said, "the fact that a tenant does not request a specific or suitable accommodation does not relieve a landlord from making one." However, other cases support the prevailing opinion. See *v. Kriegsfeld Corporation*, 884 A.2d 1109 (D.C. 2005) and Massachusetts SJC case, *Andover Housing Authority vs. Shkolnik*, (hereafter, *Shkolnik*) slip opinion, SJC 09306, Nov. 2, 2004-Jan. 14, 2005, which suggest that it is the responsibility of the tenant (except when the nature of the disability and need for the accommodation is very obvious, such as witnessing someone who uses a wheelchair struggling to enter the building) to begin the process.

107. Be careful how you "offer" an accommodation. Courts have generally rejected accommodations imposed by landlords that fail to consider the input of the tenant for whom an accommodation is required. See *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Ore. 1998).

108. See Joint Memo on Reasonable Accommodations, pages 12-14, Joint Memo on Physical Modifications, pages 4-6, and 4350.3 REV-paragraph **3-28 B, beginning** on page 3-76.

109. HUD policy and a long line of cases support this position. See **Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, Federal Register** / Vol. 73, No. 208 / Monday, October 27, 2008, Joint Statement on Reasonable Accommodation, page 6, PIH Accessibility Notice, page 4, Frequently Asked Questions, page 8, HUD Handbook

4350.3, paragraph 2-27B, page 2-22, **Assistance Animals as a Reasonable Accommodation**, paragraph 2-44, beginning page 2-41 and **Verification of the Need for an Assistance Animal**, paragraph 3-29, page 3-77, and the following cases: *Fulciniti v. Village of Shadyside Condominium Association*, No. 96-1825 (W.D. Pa. Nov. 20, 1998); *Karlsruud v. Joseph and Eda Pell Revocable Trust*, No. C-95-2967 CAL ENE (N.D. Cal. consent decree and final order 7-24-96); *Housing Authority of the City of New London v. Toni Tarrant*, No. 12480, 1997 Conn. Super. LEXIS 120 (Conn. Super. Ct. 1-14-97), (FH-FL Rptr. ¶18,211), 1997 WL 30320. *Durkee v. Staszack*, 636 N.Y.S. 2d 880 (N.Y. App. Div.1996); HUD v. *Riverbay*, FH-FL Rptr. ¶25,080 (HUD Office of ALJS 1994); *Crossroads Apartments v. LeBoo*, 152 Misc. 2d 830,578 N.Y.S. 2d 1004, FH-FL Rptr. ¶18,100 (City Court of Rochester, N.Y. 1991); *Whittier Terrace v. Hampshire*, 532 N.E. 2d 712 (Mass. App. Ct. 1989); and *Majors v. Housing Authority of the County of Dekalb*, 652 f.2d 454 (5th Cir. 1981). Also see HUD's Office of FHEO's Notice, 2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, April 25, 2013.

110. See HUD Handbook 4350.3, Pet Rules, paragraph 6-10, beginning page 6-22, and 24 CFR Section 960.707. Also see **Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, Federal Register** / Vol. 73, No. 208 / Monday, October 27, 2008,

111. HUD Handbook 4350.3, Glossary, p.20, 24 CFR 966.4(d)(3), 982.316, and 982.402(b). Also see PIH Non Discrimination Notice, G. Admission and Occupancy, 3., page 23 and PIH Accessibility Notice, Section F. Admission/Occupancy #3, page 21. The definition of a live in aid that is used in state-aided public housing in MA is slightly different than the federal definition. The state definition contained in **60 CMR 6.00: OCCUPANCY STANDARDS AND TENANT PARTICIPATION FOR STATE-AIDED HOUSING** requires that the live in aid be paid for his/her services. It states:

Personal care attendant (PCA) - a person who resides with a household member with a disability and who (a) provides necessary assistance in activities of daily living to such household member insofar as he or she requires such assistance on account of his or her disability; (b) is not obligated for support of the household member; (c) is paid for the fair

- value of such assistance; and (d) would not be residing in the unit except to provide such necessary assistance to the household member.
112. HUD Handbook 4350.3, paragraph 6-5A3.g., page 6-8, and See paragraph 6-12C, beginning page 6-29 of Handbook 4350.3 REV 1 for information on getting a HUD approval for a lease addendum. The Handbook implies that an adult child needed for the “essential care of (a) family member” can’t be treated as a live-in-aide, whereas an adult child can be considered a live-in-aide in the 202/8 program. See Figure 7-2: Comparison of Live-in Aid and Adult Child in 202/8 and 202 PRAC projects, page 7-6. There is no rationale given for the differential treatment of an adult child in these two programs. Based on written information regarding this paragraph from HUD’s Multifamily housing office, received after change 4 to this Handbook, this paragraph is not to be construed to mean that adult children are not eligible to move in after initial occupancy as a live-in aide in the Section 202/8 program.
113. See 24 C.F.R. §982.316 and HUD Handbook 4350.3, Glossary page 22 and Paragraph 3-6E 3.a.(2)(c), page 3-9. This paragraph recommends an addendum to the lease be attached specifying that the live-in aid qualifies for occupancy only as long as the individual needing supportive services does and may not qualify for continued occupancy as a remaining family member. It also suggests that the addendum should give the owner the right to evict a live-in aid who violates the lease or any of the house rules. This approach may be faulty given that the PCA presumably has no tenancy rights. Also see PIH Non Discrimination Notice, G. Admission and Occupancy, 3., page 23 and PIH Accessibility Notice, Section F. Admission/Occupancy #3, page 21.
114. PIH Non Discrimination Notice, G. Admission and Occupancy, 3., page 23 and PIH Accessibility Notice, Section F. Admission/Occupancy #3, page 21., 24 CFR 966.4(d)(3), 982.316, 982402(b), HUD Handbook 4350.3 paragraph 3-23E6.d, page 3-71 and Figure 6-9, page 6-47, Summary of Documents for Tenants.
115. Question 24, HUD’s Final Multifamily Mailbox: 4350.3 REV-1 Summary of Questions, www.hud.gov/offices/hsg/mfh/rhiip/qnaon4350pt3.pdf In regards to HUD’s Housing Choice Voucher program, PHAs “may not approve an unidentified live-in aide, nor a larger unit than the family qualifies for under

the PHA's subsidy standards for an unidentified live-in aide." In addition, "A PHA may only approve one additional bedroom for a live-in aide. Although a live-in aide may have PHA-approved family member/s live with him/her in the assisted unit, no additional bedrooms will be provided for the family members of the live-in aide. The PHA must ensure that housing quality standards (HQS) will not be violated and that there will be no more than two people per bedroom or living/sleeping space in the unit in accordance with 24 CFR § 982.401(d)(2)(ii). If the approval of additional family members of a live-in aide would result in the violation of HQS, the additional family members of the live-in aide may not be approved." See PIH 2014-25 (HA), Over Subsidization in the Housing Choice Voucher Program, October 16, 2014.

116. HUD Handbook 4350.3 REV 1, paragraph 4-7B5, page. 4-18.

117. In Massachusetts, there are three different levels of access to CORI which may apply to housing providers in the context of applicants and residents: Required Access to CORI, which has four different levels of access, and is available to those requestors screening applicants for the rental or leasing of housing and are required by a statutory, regulatory, or accreditation provision to obtain CORI; Standard Access to CORI which is available to housing providers to screen tenants; and Open Access to CORI which is available to all members of the general public. The level of access depends on who the requestor is and whether a statute, regulation, or accreditation requirement authorizes or requires the requestor to obtain a certain level of CORI. In accordance with 803 CMR 2.04, a housing provider may register for an iCORI account to access CORI to evaluate housing applicants. Regulation applicable to landlord, property management company, real estate agency, and public housing authority registration is pursuant to 803 CMR 5.00: Criminal Offender Record Information (CORI) - Housing. Please check with your attorney regarding the level of access your site is permitted and under what circumstances.

118. See *Douglas v. Kriegsfeld Corporation*, 884 A.2d 1109 (D.C. 2005); *Andover Housing Authority vs. Shkolnik*, (hereafter, *Shkolnik*) slip opinion, SJC 09306, Nov. 2, 2004-Jan. 14, 2005; *Radecki v. Joura*, 114 F.3d 115 (8th Cir. 1997); *St. George Villa Associates, and St. George Apartments v. Barnhurst*, No 9605 00683 (EV), (5th Dist. Wash. Cty. Utah Aug. 1996); *Roe*

v. Housing Authority, 909 F.Supp. 814 (D. Colo. 1995); *Roe v. Sugar River Mills Assoc.*, 820 F.Supp. 636 (D.N.H. 1993); *Citywide Associates v. Penfield*, No. 89-SP-9147-S, Hampden Division of the Housing Court Department (4/21/89), *aff'd*, 409 Mass. 140 (1991); and *Crossroads Apartments v. LeBoo*, FH-FL Rptr. ¶18,100 (City of Rochester, NY, 1990).

119. Federally subsidized housing providers and public housing providers are required in accordance with Section 644 of the Housing and Community Development Act of 1992 ([42 U.S.C. 13604](#)) to offer applicants an opportunity to provide emergency contact information to facilitate the delivery of services or special care to applicants who become tenants and to assist with resolving any tenancy issues arising during tenancy. In order to ensure that O/As comply with this requirement, HUD has provided a standard form for use in gathering the information from applicants. Completion of the form is optional on the part of the applicant. O/As must begin including Form HUD-92006, Supplement to Application for Federally Assisted Housing, (Attachment A) as part of the application packet. Tenants should also be provided the opportunity to update this form at recertification, which includes completing a form if not previously done. See Par 4-14 A.3., pg. 4-34 and Par 4-14 D., beginning on pg. 4-36, which contains specific confidentiality and retention requirements for this form.

120. Many advocates believe that the general requirement in federal law to inform all applicants and tenants about the law and your obligation to comply with the law includes a notice under these circumstances. See 28 C.F.R. 35.106 and 24 C.F.R. 8.54. Assisted housing providers financed by HUD are required to include in the eviction notice a statement that people with disabilities have the right to request reasonable accommodation to participate in the hearing process. 4350.3 REV 1, paragraph 8-13 B. 2.(5), page 8-15. Also, PHAs are required to provide ongoing notification of the right to a reasonable accommodation to participate in hearings and other matters. See 24 CFR § 966.7 Accommodation of persons with disabilities.

121. See, *Citywide Associates v. Penfield*, No. 89-SP-9147-S, Hampden Division of the Housing Court Department (4/21/89), *aff'd*, 409 Mass. 140 (1991). Also see *Housing Authority of City of Bangor v. Maheux*, 748 A.2d 474 (Me. 2000); *St. George Villa Associates*, and *St. George Apartments v. Barnhurst*, No 9605 00683 (EV), (5th Dist. Wash. Cty. Utah Aug. 1996); *Roe*

v. Housing Authority, 909 F.Supp. 814 (D. Colo. 1995); and *Roe v. Sugar River Mills Assoc.*, 820 F.Supp. 636 (D.N.H. 1993). Also see *Shkolnik*. In this case the judge indicates consideration of reasonable accommodation occurred prior to eviction although tenant at various points denied lease-violating behavior.

122. HUD Handbook 4350.3, Exhibit 2-3: Sample Notification of Nondiscrimination on the Basis of Disability Status.

123. In November 2011, the Massachusetts legislature enacted a law, H.3810, *An Act Relative to Gender Identity*, that was signed by the Governor effective on July 1, 2012. This law prohibits discrimination in several key areas and defines gender identity as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.” See <http://www.malegislature.gov/Bills/187/House/H03810>.

Also, HUD has published a final rule

HUD has also published a final rule which Clarifies that all otherwise eligible families, regardless of marital status, sexual orientation, or gender identity, will have the opportunity to participate in HUD programs and explicitly includes specific prohibitions regarding the adverse treatment of individuals based on sexual orientation or gender identity in HUD assisted housing and HUD-insured housing, although doesn’t make gender identity or sexual orientation a protected class. The final rule "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" in the Federal Register has an effective date of March 5, 2012. A copy of the final rule may be found at

<https://www.federalregister.gov/articles/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity>.

HUD has also published Notice H 2015-01, February 6, 2015: **Notice of Program Eligibility for HUD Assisted and Insured Housing Programs for All People Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD’s Equal Access Rule**, on this topic, designed to inform housing providers of HUD’s requirements.

124. See 24 CFR Part 1 et, Title VI of the Civil Rights Act of 1964, **Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Federal Register** / Vol. 72, No. 13 / Monday, January 22, 2007. Also please note that the Rural Development published their guidance Federal Register, Vol. 79, No. 229, Friday, November 28, 2014
125. See HUD Frequently Asked Questions, “When and How Should an Individual request an Accommodation?” Also see *Radecki v. Joura*, 114 F.3d 115 (8th Cir. 1997). The court in this case held that whether the landlord knew of the tenant’s disability before evicting him had to be determined as of the date the tenant was evicted, not the date the notice of eviction was given to the tenant.
126. See *Nason v. Stone Hill Realty Assoc.*, FH-FL Rptr. ¶18,197 (Mass. Super. Ct., Middlesex Co. May 6, 1966). Also see PIH Non Discrimination Notice, G. 9. Pets, page 23, PIH Accessibility Notice, F. 9. PETS, page 23; and HUD Handbook 4350.3, paragraph 2-44 Assistance Animals as a Reasonable Accommodation, beginning on page 2-41. Also see **Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, Federal Register** / Vol. 73, No. 208 / Monday, October 27, 2008. Also see HUD’s Office of FHEO’s Notice, 2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, April 25, 2013.
127. See Joint Memo on Reasonable Accommodation, Question 17 and 18, beginning pg 12, Joint Memo on Reasonable Modification, Question 6 and 7, beginning pg 4. Also see PIH Non Discrimination Notice, E. 1., page 13 and G. 4., page 24, PIH Accessibility Notice, Section E, page 11 and Section F. 4. , page 21 and HUD Handbook 4350.3, paragraph 2-31 E and F., beginning page 2-27. Also see HUD’s Office of FHEO’s Notice, 2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, April 25, 2013.
128. HUD Handbook 4350.3, PARAGRAPH 3-28B., page 3-76 and Joint Memo on Reasonable Accommodation, Questions 17 and 18, beginning page 12. and Joint Memo on Reasonable Modification, Question 6 and 7.

129. See PIH Non Discrimination Notice, G. 9. Pets, page 23, PIH Accessibility Notice, F. 9. PETS, page 23; and HUD Handbook 4350.3, paragraph 2-44 Assistance Animals as a Reasonable Accommodation, beginning on page 2-41. Also see **Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, Federal Register** / Vol. 73, No. 208 / Monday, October 27, 2008. Also see: *Housing Authority of the City of New London v. Toni Tarrant*, No. 12480, 1997 Conn. Super. LEXIS 120 (Conn. Super. Ct. 1-14-97), (FH-FL Rptr. ¶18,211), 1997 WL 30320; *Nasan v. Stone Hill Realty Assoc.*, FH-FL Rptr. ¶18,197 (Mass. Super. Ct., Middlesex Co., May 6, 1996); *Crossroads Apartments Associates v. LeBoo*, New York, 152 Misc.2d 830 (N.Y. 1991); *Prindable v. Association of Apartment Owners of 2987 Kalakaua*, 304 F.Supp.2d 1245 (D. Hawaii, 2003). . Also see HUD's Office of FHEO's Notice, 2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, April 25, 2013.

Many housing providers erroneously rely on Title III's regulations regarding service animals to preclude specific types of animals as service animals for residents and companion animals as qualifying as a service animal.. The ADA's Title III regulations, limits service animals to dogs that are "individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." See 28 CFR §36.104. The Section-by-Section-Analysis of the Justice Department's Title III regulations discuss the distinction between a "service animal" under the ADA and an "assistance animal" under the Fair Housing Act. The discussion of Service animals begins on page 80 of the Section by Section Analysis, and the discussion of how a public accommodation is different than housing begins on page 89. The Section of the regulation that addresses service animals is 28 CFR §36.302(c). The only animal other than a dog permitted in accordance with the regulations is a miniature horse. See 28 CFR §36.104(9). The regulations and the Section-by-Section Analysis can be located at http://www.ada.gov/regs2010/ADAregs2010.htm#titleIII_final_2010 HUD has published clear guidance on . See HUD's Office of FHEO's Notice,

2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, April 25, 2013.

130. PIH Non Discrimination Notice, G. 9. Pets, page 23, PIH Accessibility Notice, F. 9. PETS, page 23; and HUD Handbook 4350.3, paragraph 2-44 Assistance Animals as a Reasonable Accommodation, beginning on page 2-41. Also see **Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, Federal Register** / Vol. 73, No. 208 / Monday, October 27, 1. *Woodside Village v. Hertzmark*, FH-FL Rptr. ¶18,129 (Conn. Superior Ct. 1993).
131. PIH Non Discrimination Notice, G. 9. Pets, page 23, PIH Accessibility Notice, F. 9. PETS, page 23; and HUD Handbook 4350.3, paragraph 2-44 Assistance Animals as a Reasonable Accommodation, beginning on page 2-41 and paragraph 6-10 A.4. Also see **Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, Federal Register** / Vol. 73, No. 208 / Monday, October 27, This is specifically contained in the HUD model leases. HUD Model Lease for Section 202/8 or Section 202 PACs, Appendix 4-B(16). HUD Model Lease for Section 202 PRACs, Appendix 4-C(14). HUD Model Lease for Section 811 PRACs, Appendix 4-D(14). Courts have permitted housing providers to evict tenants for failing to comply with reasonable rules regarding appropriate maintenance of an assistance animal. See *Woodside Village v. Hertzmark*, FH-FL Rptr. & ¶18, 129, 1993 WL 268293 (Conn. Super. Ct. 1993).
132. HUD Guidance provides that an undue financial and administrative burden is satisfied under the Fair Housing Act “if an insurance carrier would cancel, substantially increase the costs of the insurance policy, or adversely change the terms because of the presence of a certain breed of dog or a certain animal.” However, the guidance also provides that “If the investigator finds evidence that an insurance provider has a policy of refusing to insure any housing that has animals, without exception for assistance animals, it may refer that information to the Department of Justice for investigation to determine whether the insurance provider has violated federal civil rights laws prohibiting discrimination based upon disability.” See memorandum to FHEO Regional Directors from Brian Greene, Deputy Assistant Secretary for Enforcement and Programs, ED: Insurance Policy Restrictions as a Defense for Refusals to Make a Reasonable Accommodation, June 12, 2006. This

may then put a housing provider in a precarious situation because a housing provider's contract with an Insurance Company that has such a policy may be considered a violation of Section 504 of the Rehabilitation Act in accordance with this law's implementing regulations as well as the ADA. See: Section 504's implementing regulations at 24 CFR §8.4 (b)(1)(4); Title II's implementing regulations at 28 CFR § 35.130 (b)(3) and § 35.136 (which addresses service animals [dogs and miniature horses]); and Title III's implementing regulations at § 36.202 and § 36.302(c) 136 (which addresses service animals [dogs and miniature horses]). The Department of Justice's (DOJ) supplemental information for both sets of ADA regulations specifically states that the DOJ does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs and that such deference would have the effect of limiting the rights of persons with disabilities under the ADA. As such, it is unlikely that the DOJ would consider an insurance company's blanket policy legitimate either, or believe a housing provider is immune from liability if they contracted with an insurance carrier who had such a policy. Please see the DOJ's discussion on "breeds" of dogs contained in **Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability in State and Local Government Services** and **Revised Final Title III Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities** which can be found at <http://www.ada.gov/regs2010/ADAregs2010.htm> . Also see HUD's Office of FHEO's Notice, 2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, April 25, 2013.

133. MGL c. **Chapter 186: Section 15B (1)(b)(iii)**.

134. See 24 CFR part 5, subpart C – Pet Ownership for the Elderly or Persons with Disabilities. This is specifically contained in HUD Handbook 4350.3 REV-1the HUD model leases. HUD Model Lease for Subsidized Programs (Family Model Lease), Appendix 4-A(13)(D). HUD Model Lease for Section 202/8 or Section 202 PACs, Appendix 4-B(16). HUD Model Lease for Section 202 PRACs, Appendix 4-C(14). HUD Model Lease for Section 811

PRACs, Appendix 4-D(14). Also see 760 CMR 6.07: Pet Ownership in Elderly/Handicapped Housing.

135. The Fair Housing Act's regulations don't specifically address this. Nor do Section 504's regulations. That being said, there are a number of provisions in these laws that indicate you could not preclude a person with a disability who had a service or companion animal from bringing an animal on the premises in the building. Also, the ADA's regulations to Title III do address this, and the site's office is considered a public accommodation. See Title III's implementing regulations at § 36.202 and § 36.302(c) 136 (which addresses service animals [dogs and miniature horses]) and DOJ's discussion of this topic contained in **Revised Final Title III Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities** which can be found at: <http://www.ada.gov/regs2010/ADAregs2010.htm> Likewise, Title II's regulations address this. See 28 CFR § 35.130 (b)(3) and § 35.136 (which addresses service animals [dogs and miniature horses]) and **Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability in State and Local Government Services** which can be found at: <http://www.ada.gov/regs2010/ADAregs2010.htm> Also see 24 CFR 5.303 which applies to federally assisted and public housing providers. **HUD also issued a notice which applies to all Public and Assisted Housing providers, as well as other providers covered by the Fair Housing Act, Section 504 of the Rehabilitation Act and the ADA summarizing the requirements under these laws with respect to animals that provide assistance to individuals with disabilities, See FHEO Notice: FHEO-2013-01 Issued: April 25, 2013.**

136. HUD Handbook 4350.3, paragraph 6-9 B.2.b.(2), page 6-21.

137. When a tenant fails to provide the required recertification information by the recertification anniversary date, an owner must inquire whether extenuating circumstances prevented the tenant from responding prior to the anniversary date. An extenuating circumstance is a circumstance beyond the tenant's control. Examples of extenuating circumstances include, but are not limited to: hospitalization of the tenant, tenant out of town for a family emergency

(such as the death or severe illness of a close family member), an adult serving in the military, students away at college, or a family member who is permanently confined to a nursing home or hospital.(4350.3, Rev-1, Change 4, Chapter 7, Paragraph 7-8.D.4, MAT User's Guide, Chapter 5, MAT Field 77 (Tenant Signed Date) pages 5-38-5-39 and MAT Field 99 (Extenuating Circumstances Code) pages 5-47-5-48)

With TRACS Release 202D, owners have the ability to process recertifications that will be late due to a legitimate extenuating circumstance. The owner does not have to request the housing assistance payment, or HAP, off the old annual recertification, rather, they can process the new annual recertification and activate the Extenuating Circumstances Code. HUD has clarified that this applies to both a completed annual recertification for which an owner is only waiting on tenant signature as well as an in process annual recertification where the household's extenuating circumstance began before the owner was able to collect all of the paperwork required. When a legitimate extenuating circumstance is present, an owner may process the annual recertification with as much information as is available, activate the Extenuating Circumstances Code, and document the tenant file accordingly. It is important to note that as soon as the owner is able to gather the required documentation to calculate income and rent, the owner will process a correction to the original annual recertification, obtain tenant(s) signature, and document the tenant file accordingly. In these situations, the owner may increase the tenant's rent retroactive to the recertification anniversary date as long as the owner provides all three recertification reminder notices per HUD requirements. (4350.3, Rev-1, Change 4, Chapter 7, Paragraph 7-8.D.3.a, MAT User's Guide, Chapter 4, Section 4.39.6 (Extenuating Circumstances Codes on ARs and the impact on the 15-month rule))

138. See 24 C.F.R. §982.312(a), "Absence from unit".

139. Id at §982.312(e)(2).

140. Federally subsidized housing providers and public housing providers are required in accordance with Section 644 of the Housing and Community Development Act of 1992 ([42 U.S.C. 13604](#)) to offer applicants an opportunity to provide emergency contact information to facilitate the

delivery of services or special care to applicants who become tenants and to assist with resolving any tenancy issues arising during tenancy.

In order to ensure that owners and agents comply with this requirement, HUD has provided a standard form for use in gathering the information from applicants. Completion of the form is optional on the part of the applicant. owners and agents must include Form HUD-92006, Supplement to Application for Federally Assisted Housing, (Attachment A) as part of the application packet. Tenants should also be provided the opportunity to update this form at recertification. See Par 4-14 A.3., pg. 4-34 and Par 4-14 D., beginning on pg. 4-36, which contains specific confidentiality and retention requirements for this form.

Also, it is important to note that SSI continues for three months during hospitalizations. 42 U.S.C.1382, Section 1611(e)(1)(G)&(H) at http://www.ssa.gov/OP_Home/ssact/title16b/1611.htm.

Also see Understanding Supplemental Security Income SSI Spotlight on Continued SSI Benefits for Persons Who are Temporarily Institutionalized 2008 Edition, at <http://www.ssa.gov/ssi/spotlights/spot-temp-institution.htm>

141. **M.G.L.c. 239: Section 3. Judgment and execution; costs; appeal.**

142. **Id.**

143. See PIH Nondiscrimination Notice, beginning on pg. 5 and PIH Accessibility Notice, beginning on page 4, HUD Handbook 4350.3, PARAGRAPH 2-40, beginning page 2-37; and HUD/DOJ Statement on Reasonable Accommodation, Question 7, page 7. Also see HUD Frequently Asked Questions "When Can a Federally Assisted Housing Provider Insist on an Alternative to the Accommodation Requested By a Tenant?", p. 10. Also see HUD/DOJ Statement on Reasonable Modification, Question 31, beginning on page 16.

144. See HUD/DOJ Statement on Reasonable Accommodation, Question 7, page 8.

145. See HUD/DOJ Statement on Reasonable Accommodation,, Question 7, page 8, HUD Handbook 4350.3, PARAGRAPH 2-40, beginning page 2-37

and HUD Frequently Asked Questions "When Can a Federally Assisted Housing Provider Insist on an Alternative to the Accommodation Requested By a Tenant?", p. 10.

146. See HUD/DOJ Statement on Reasonable Modification, Question 31, page 17. However, see PIH Nondiscrimination Notice, on pg. 6 and PIH Accessibility Notice, on page 5, where HUD makes it a point to emphasize that in the context of physical modifications that a PHA may satisfy its obligation either by making and paying for the requested structural change or by using another equally effective method. The example cited is transferring a resident with a disability who needs an accessible unit to an available one or an accessible unit that can be modified to meet the person's disability related need rather than modify the tenant's current inaccessible unit.
147. HUD Handbook 4350.3, paragraph 2-29 C,3, page 2-25, and Exhibit 2-3, page 2-51. In regards to meeting the needs of individuals with Limited English Proficiency see See 24 CFR Part 1 et, Title VI of the Civil Rights Act of 1964, **Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Federal Register / Vol. 72, No. 13 / Monday, January 22, 2007**. This guidance and owners obligations are also discussed in HUD Handbook 4350.3 Rev-1, Paragraph 2-9 C. on page 2-9. It is also discussed in PIH Notice: PIH-2011-31, Guidance on non-discrimination and equal opportunity requirements for PHAs, issued 6/13/2011 in **Section VIII. Improving Access to Services for Persons with Limited English Proficiency, page 15**. . Also please note that the Rural Development published their guidance Federal Register, Vol. 79, No. 229, Friday, November 28, 2014
148. [The Federal Fair Housing Act, M.G.L. c. 151B](#), Also, HUD has also published a final rule which Clarifies that all otherwise eligible families, regardless of marital status, sexual orientation, or gender identity, will have the opportunity to participate in HUD programs and explicitly includes specific prohibitions regarding the adverse treatment of individuals based on sexual orientation or gender identity in HUD assisted housing and HUD-insured housing, although doesn't make gender identity or sexual orientation a protected class. The final rule "Equal Access to Housing in HUD

Programs Regardless of Sexual Orientation or Gender Identity" in the Federal Register has an effective date of March 5, 2012. A copy of the final rule may be found at

<https://www.federalregister.gov/articles/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity>. HUD has also published Notice H 2015-01, February 6,

2015: **Notice of Program Eligibility for HUD Assisted and Insured Housing Programs for All People Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD's Equal Access Rule**, on this topic, designed to inform housing providers of HUD's requirements.

149. A number of cases indicate that providers must exhaust reasonable accommodation before evicting a tenant whose bad behavior is a result of her disability. See *Boston Housing Authority v. Emmitt Bridgewaters*, 452 Mass. 833, 842-843, 898 N.E.2d 848 (2009) (hereinafter *Bridgewaters*), *Housing Authority of City of Bangor v. Maheux*, 748 A.2d 474 (Me. 2000); *Cornwell & Taylor LLP vs. Moore*, No. C8-00-1000 (Minn. Ct. App. Dec. 22, 2000), *St. George Villa Associates*, and *St. George Apartments v. Barnhurst*, No 9605 00683 (EV), (5th Dist. Wash. Cty. Utah Aug. 1996); *Roe v. Housing Auth. of Boulder*, 909 F. Supp. 814, 822-823 (D. Colo. 1995); and *Roe v. Sugar River Mills Assocs.*, 820 F. Supp. 636, 640 (D.N.H. 1993). However, see *Arnold Construction, AL.L.C. v. Hicks*, 621 N.W.2d 171, 175-176 (S.D. 2001). This case falls somewhat outside the established line of cases on "direct threat." The Court in this case, as in others, established that when a landlord shows that no reasonable accommodation will curtail the risk, its duty to accommodate ceases. However, the threshold on establishing direct threat and considering reasonable accommodation before an eviction was significantly less than other cases. The court in this case held that the landlord had "established that no reasonable accommodation would curb the threat [the tenant] posed based only on this evidence and the tenant's inability to propose accommodations that might ameliorate the situation, the court concluded that no reasonable accommodation could effectively minimize the threat to other tenants. That being said, the MA Supreme Judicial Court in the *Boston Housing Authority v. Emmitt Bridgewaters* (see above) cited this case in support of its position that "before a federally assisted public housing authority such as the BHA may

lawfully evict a disabled tenant who requests a reasonable accommodation as posing a threat to others, it must either demonstrate the failure of an accommodation instituted at the request of the tenant, or demonstrate that no reasonable accommodation will acceptably minimize the risk the tenant poses to other residents.” It further stated that this case held that an eviction may be affirmed when “landlord had ‘established that no reasonable accommodation would curb the threat [the tenant] poses,’ and concluding that when ‘landlord shows that no reasonable accommodation will curtail the risk, its duty to accommodate ceases’”).

150. HUD Handbook 4350.3, paragraph 2-29 C,3, page 2-25, and Exhibit 2-3, page 2-51. In regards to meeting the needs of individuals with Limited English Proficiency see See 24 CFR Part 1 et, Title VI of the Civil Rights Act of 1964, **Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Federal Register / Vol. 72, No. 13 / Monday, January 22, 2007**. Also please note that the Rural Development published their guidance Federal Register, Vol. 79, No. 229, Friday, November 28, 2014
151. *Temple v. Gunsalus*, No. 95-31751, FH-FL Rptr. ¶16,116, 1996 WL 536710 (6th Cir. Sept. 20, 1996). Also see *Andover Housing Authority vs. Shkolnik, (hereafter, Shkolnik) slip opinion*, SJC 09306, Nov. 2, 2004-Jan. 14, 2005.
152. See HUD Handbook 4350.3, Figure 8-2, Allowable Circumstances for Terminating Tenancy, page 8-11 and paragraph 8-13, Material Noncompliance with the Lease, beginning on page 8-11. Also see 24 C.F.R. § PART 966—PUBLIC HOUSING LEASE AND GRIEVANCE PROCEDURE, § 966.4(l) and 24 C.F.R. § 982.208 (Lease and Tenancy) and § 982.310 (Owner Termination of Tenancy).
153. See *Bridgewaters*, 452 Mass. 833.842-843, 898 N.E.2d 848 (2009) *Douglas v. Kriegsfeld Corporation*, 884 A.2d 1109, 1121(D.C.2005); *Housing Auth. Of Bangor v. Maheux*, 748 A.2d 474, 476 (Me. 2000); *Andover Housing Authority vs. Shkolnik, (hereafter, Shkolnik)*, 443 Mass. 300, 820 N.E.2d 815(2005); *Radecki v. Joura*, 114 F.3d 115, 116-17 (8th Cir. 1997).
154. For example, *Bridgewaters*, cited herein.
155. See ***Shkolnik*, 443 Mass.300, 306(2 0 0 5) .**

156. See HUD Handbook 4350.3 paragraph 2-29 C. 3 & 4., page 2-25, and Exhibit 2-3 page 2-51, Sample Notification of Nondiscrimination on the Basis of Disability Status. Also see 24 CFR Part 1 et, Title VI of the Civil Rights Act of 1964, **Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Federal Register / Vol. 72, No. 13 / Monday, January 22, 2007**. This guidance and owners obligations are also discussed in HUD Handbook 4350.3 Rev-1, Paragraph 2-9 C. on page 2-9. It is also discussed in PIH Notice: PIH-2011-31, Guidance on non-discrimination and equal opportunity requirements for PHAs, issued 6/13/2011 in **Section VIII. Improving Access to Services for Persons with Limited English Proficiency, page 15**. Also please note that the Rural Development published their guidance Federal Register, Vol. 79, No. 229, Friday, November 28, 2014

157. Please note that sexual orientation and gender identity are protected classes under state law. HUD has also published a final rule which Clarifies that all otherwise eligible families, regardless of marital status, sexual orientation, or gender identity, will have the opportunity to participate in HUD programs and explicitly includes specific prohibitions regarding the adverse treatment of individuals based on sexual orientation or gender identity in HUD assisted housing and HUD-insured housing, although doesn't make gender identity or sexual orientation a protected class. The final rule "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" in the Federal Register has an effective date of March 5, 2012. A copy of the final rule may be found at <https://www.federalregister.gov/articles/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity>. HUD has also published Notice H 2015-01, February 6, 2015: **Notice of Program Eligibility for HUD Assisted and Insured Housing Programs for All People Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD's Equal Access Rule**, on this topic, designed to inform housing providers of HUD's requirements.

158. The Tenancy Preservation Program operates in collaboration with a number of agencies and organizations, including MassHousing; The Housing Court

Department of the Massachusetts Trial Court; the Massachusetts Departments of Children and Families, Housing and Community Development, Mental Health, Mental Retardation, Public Health and Transitional Assistance, the Executive Office of Elder Affairs, public housing authorities, private management companies, and legal service agencies. For more information, go to www.masshousing.com/tpp or contact David Eng of MassHousing at 617.854.1089 or deng@masshousing.com.

159. *Citywide Associates v. Penfield*, No. 89-SP-9147-S, Hampden Division of the Housing Court Department (4/21/89), aff'd, 409 Mass. 140 (1991); *Peabody Properties, Inc. v. Jeffries*, No. 88-SP-7613-S, Hampden Division of the Massachusetts Housing Court (1/6/89). Also see *Cornwell and Taylor v. Moore*, 2000 WL 1887528 (Minn. App. Dec. 22, 2000), *St. George Villa Associates*, and *St. George Apartments v. Barnhurst*, No 9605 00683 (EV), (5th Dist. Wash. Cty. Utah Aug. 1996); *Roe v. Housing Authority of City of Boulder* 909 F.Supp. 814 (D. Colo. 1995); *Roe v. Sugar River Mills Assoc.*, 820 F.Supp. 636 (D.N.H. 1993); and *Andover Housing Authority vs. Shkolnik, (hereafter, Shkolnik)*, 443 Mass. 300, 820 N.E.2d 815(2005) This case provides insight into the limits of what a housing provider has to do. Likewise see *Pine Valley Court Apartments v Bowe*, (N.J. Super.App. Div., 2007, unpublished opinion) and *Villa Victoria v Schuler* (NJ Super.App Div., 2008, unpublished opinion).

160. See HUD Handbook 4350.3 paragraph 2-29 C. 3 & 4., page 2-25, and Exhibit 2-3 page 2-51, Sample Notification of Nondiscrimination on the Basis of Disability Status. See 24 CFR Part 1 et, Title VI of the Civil Rights Act of 1964, **Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Federal Register / Vol. 72, No. 13 / Monday, January 22, 2007**. This guidance and owners obligations are also discussed in HUD Handbook 4350.3 Rev-1, Paragraph 2-9 C. on page 2-9. It is also discussed in PIH Notice: PIH-2011-31, Guidance on non-discrimination and equal opportunity requirements for PHAs, issued 6/13/2011 in **Section VIII. Improving Access to Services for Persons with Limited English Proficiency, page 15**. Also please note that the Rural Development published their guidance Federal Register, Vol. 79, No. 229, Friday, November 28, 2014

161. HUD has also published a final rule which Clarifies that all otherwise eligible families, regardless of marital status, sexual orientation, or gender identity, will have the opportunity to participate in HUD programs and explicitly includes specific prohibitions regarding the adverse treatment of individuals based on sexual orientation or gender identity in HUD assisted housing and HUD-insured housing, although doesn't make gender identity or sexual orientation a protected class. The final rule "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" in the Federal Register has an effective date of March 5, 2012. A copy of the final rule may be found at <https://www.federalregister.gov/articles/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity>. HUD has also published Notice H 2015-01, February 6, 2015: **Notice of Program Eligibility for HUD Assisted and Insured Housing Programs for All People Regardless of Sexual Orientation, Gender Identity or Marital Status as Required by HUD's Equal Access Rule**, on this topic, designed to inform housing providers of HUD's requirements.
162. See Joint Statement on Reasonable Accommodation, Question 5, page 5 and 6. There are also a series of cases that require a housing provider to consider reasonable accommodation during an eviction of a tenant with a disability based on her violent actions. See *Bridgewaters*, 452 Mass. 833.842-843, 898 N.E.2d 848 (2009) (a housing provider may lawfully evict a tenant with a disability who requests a reasonable accommodation as posing a threat to others only "when it demonstrates the failure of an accommodation instituted at the request of the tenant, or demonstrates that no reasonable accommodation will acceptably minimize the risk the tenant poses to other tenants."). The court in this case specifically stated, "Before a public housing authority may conclude that a disabled tenant poses 'a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services,' 24 C.F.R. § §9.131(b)(2008), the authority 'must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether there

reasonable modifications of policies, practices, or procedures will mitigate the risk.’ 24 C.F.R §9.131(c)(2008).” Please note that in footnote 1 in this case the Court indicates that it is deciding this case under the Federal Fair Housing Act, and that although Bridgewater also asserted claims under a number of other laws including §504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000); the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (2000); the Massachusetts Antidiscrimination Law, G.L. c. 151B, § 4; and art. 114 of the Amendments to the Massachusetts Constitution the court chose not to address these claims. However, cited, 24 C.F.R. § PART 9—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, which are implementing regulations for §504 of the Rehabilitation Act of 1973.

Also see *Roe v. Sugar River Mills Associates*, 820 F.Supp. 636 (D.N.H. 1993) (owner can only treat a tenant with a disability as exempt from protections under the Fair Housing Amendments Act, as a direct threat to health and safety of other tenants, if the owner has first made reasonable efforts to accommodate his or her disability); *Roe v Housing Authority of City of Boulder*, 909 F.Supp 814 (DColo 1995) (housing authority can’t evict a tenant with a disability based on violent behavior when it hadn’t tried to provide a reasonable accommodation and unless no reasonable accommodation would eliminate or acceptably minimize the risk); *Arnold Construction, A.L.L.C. v. Hicks*, 621 N.W.2d 171 (S.D. 2001); ***Cornwell & Taylor LLP v. Moore*, 2000 WL**

1887528, (Minn. App. 2001) (The landlord failed to show that no reasonable accommodation would eliminate or acceptably minimize any risk the tenant might pose); *Douglas v. K r i e g s f e l d*, 884 A.2d 1109 (D.C. 2005)(This case permitted an eviction of a tenant with a disability after factual consideration on reasonable accommodation and the determination that no reasonable accommodation could ameliorate the situation sufficiently to protect the health and safety of others).

163. See *Housing Authority of City of Bangor v. Maheux*, 748 A.2d 474 (Me. 2000)

164. HUD assisted housing providers and public housing providers are required to provide applicants an opportunity to complete Form HUD-92006 (it must be an attachment to the application) and should provide residents an opportunity to do so as well. The purpose of this form is to “assist housing providers in providing the delivery of any services or special care to the tenant and assist in any tenancy issues arising during the term of tenancy of the tenant.” See **Supplemental Information to Application for Assistance Regarding Identification of Family Member, Friend or Other Person or Organization Supportive of a Tenant for Occupancy in HUD Assisted Housing** NOTICE: H 2009-13/ NOTICE: PIH 2009- 36 (HA), September 15, 2009. Also see M.G.L. c.66A Section 2, **Holders maintaining personal data system; duties; 760 CMR 8.00: PRIVACY AND CONFIDENTIALITY** et seq. This requirement was incorporated into HUD Handbook 4350.3 Rev-1. See Par 4-14 A.3., pg. 4-34 and Par 4-14 D., beginning on pg. 4-36, which contains specific confidentiality and retention requirements for this form.
165. The 4350.3 was most recently updated in 2013. The current handbook doesn't include a number of requirements that were issued while change 4 was in clearance and after. The Public Housing Handbook is also referred to as Handbook 7465.1.
- 166.1) Guidance on non-discrimination and equal opportunity requirements for PHAs, PIH-2011-31, issued 6/13/2011 (also referenced as FHEO-2011-1), and Non-Discrimination and Accessibility for Persons with Disabilities, PIH 2010-26(HA), issued July 26, 2010, which cross references previous HUD Notices related to the topic (PIH 2003-31, PIH 2006-13, PIH Letter L-2007-05 and PIH 2009-5). Also note that PIH 2006-13 cross referencing PIH 2003-31, issued Nov. 26, 2003, which replaced PIH 2002-01.
- 2) Notice CPD-03-12, issued November 26, 2003, which extends the provisions of Notice CPD-00-10, originally issued December 26, 2000;— Accessibility for Persons with Disabilities to Non-Housing Programs funded by Community Development Block Grant Funds—Section 504 of the Rehabilitation Act of 1973, the American with Disabilities Act, and the Architectural Barriers Act.
- 3) Notice CPD-03-13, issued November 26, 2003, which extends the provisions of Notice CPD-00-9, originally issued December 26, 2000-

Accessibility for Persons with Disabilities to Non-Housing Programs funded by Community Development Block Grant Funds—Section 504 of the Rehabilitation Act of 1973, the American with Disabilities Act, and the Architectural Barriers Act.

4) Notice 04-09, issued June 29, 2004, which extends the provisions of 01-02, Compliance with Section 504 of the Rehabilitation Act of 1973 and the Disability/Accessibility Provisions of the Fair Housing Act of 1988.

5) Notice, CPD CPD-05-09, issued November 3, 2005, Accessibility Notice: Section 504 of the Rehabilitation Act of 1973 and The Fair Housing Act and their applicability to housing programs funded by the HOME Investment Partnerships Program and the Community Development Block Grant Program.

6) Notice CPD – 05-10, issued November 3, 2005, Accessibility for Persons with Disabilities to Non-Housing Programs funded by Community Development Block Grant Funds—Section 504 of the Rehabilitation Act of 1973, the American with Disabilities Act, and the Architectural Barriers Act.

167. The Department of Justice (DOJ) also enforces a number of the civil rights laws discussed, including the Fair Housing Act and the Americans with Disabilities Act. For example, the DOJ may bring a lawsuit under the Fair Housing Act if “there is reason to believe that a person or entity is engaged in a “pattern or practice” of discrimination or where a denial of rights to a group of persons raises an issue of general public importance.” The DOJ may also institute criminal proceedings “where force or threat of force is used to deny or interfere with fair housing rights” and may bring suits on behalf of individuals based on referrals from HUD. For more information see http://www.justice.gov/crt/about/hce/housing_coverage.php and <http://www.justice.gov/crt/about/drs/> DOJ’s website is an excellent resource, including information on cases the Agency has been involved in.

168. 42 U.S.C. §3604(f)(3); 24 C.F.R. §100.204(B)(FHAA); 28 C.F.R. §35.130(b)(7)(ADA); 24 C.F.R. 8.6(a)(2) and (b) and 24 C.F.R. §8.33 §(504). Also see HUD/DOJ Statement on Reasonable Modification; and HUD/DOJ Statement on Reasonable Accommodation. Question 1, in these notices, “What types of discrimination against persons with disabilities does the Act prohibit?” provide an excellent summary of the types of

discrimination the Fair Housing Act prohibits against persons with disabilities.

169.42 U.S.C. §4153 and 24 C.F.R. 40.1, et seq. For example, both PHAs and (24 CFR 40), and to buildings and facilities constructed with CDBG funds (24 CFR 570.614. See Section 504 Frequently Asked Questions: **What is the Architectural Barriers Act and what does it cover?** (http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/disabilities/sect504faq) Also the applicable design standards are the Uniform Federal Accessibility Standards (UFAS) found at 24 CFR 41.1 (d). The HUD Secretary may grant waivers on a case-by-case basis. For technical assistance, contact the Architectural and Transportation Barriers Compliance Board by phone at 202-272-0080 or 800-872-2253 or by TTY at 202-272-0082 or 800-993-2822.

170.29 U.S.C. §794

171. HUD's regulations can be found at 24 C.F.R. § Part 8 et. al. and Rural Developments regulations can be found at 7 C.F.R. § Part 15b. , HUD has also published Enforcement regulations at 24 C.F.R. § Part 9 et. al,

172.29 U.S.C. §794(b)(1).

173. See 24 CFR § 8.2 Applicability and Appendix

174. 24 CFR Section §8.22, §8.23, §8.24.

175. 24 CFR Section §8.32. Note that if an owner changes any element of a building, the element must also comply with the Massachusetts Architectural Access Board Code (AAB), 521 CMR 1 and, if applicable, the Americans with Disability Act standards (ADAAG).

176. 42 U.S.C. §3601 et. seq. This law originally barred housing discrimination on the basis of race, national origin and religion and was later amended to include sex, and then again amended to include familial status and disability, whether or not federal money was involved.

177. 42 U.S.C. §3604 (f)(1)

178. 24 C.F.R. § Part 100 et. al. There is a specific section within the regulations contained in subpart D of the regulations (Prohibition Against Discrimination Because of Handicap) as well as additional regulation sections that govern discrimination on the basis of other protected classes in regard to selling or renting a dwelling which apply to persons with disabilities. 24 C.F.R. § 100.50(b) and 100.60. HUD has also published Fair Housing Accessibility Guidelines at 56 Fed. Reg. 9472-9515, March 6, 1991. These Guidelines were supplemented by a notice, **Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines**, published in the Federal Registry on June 28, 1994 at 50 Fed. Reg. 33362-33368. HUD has published a Joint Statement with the Department of Justice, titled ACCESSIBILITY (DESIGN AND CONSTRUCTION) REQUIREMENTS FOR COVERED MULTIFAMILY DWELLINGS UNDER THE FAIR HOUSING ACT, April 30, 2013, which provides guidance regarding the Fair Housing Act's design and construction requirements. This Joint Statement is in a question and answer format and discusses the ten HUD-recognized safe harbors for compliance with the Act's design and construction requirements. Also, for additional technical assistance, see the Fair Housing Act Accessibility FIRST website, www.fairhousingfirst.org.

179. 42 U.S.C. §3602(f); 24 C.F.R. §100.202.

180. 24 CFR Part 100, Design and Construction Requirements; Compliance With ANSI A117.1 Standards; Final Rule, **Federal Register** / Vol. 73, No. 207 / Friday, October 24, 2008 /. Also see JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE, titled ACCESSIBILITY (DESIGN AND CONSTRUCTION) REQUIREMENTS FOR COVERED MULTIFAMILY DWELLINGS UNDER THE FAIR HOUSING ACT, April 30, 2013,

HUD recognizes ten safe harbors for compliance with the design and construction requirements of the Fair Housing Act. They are:

1. HUD's March 6, 1991 Fair Housing Accessibility Guidelines and the June 28, 1994 Supplemental Notice to Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines;

2. ANSI A117.1-1986 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations and the Guidelines;
3. CABO/ANSI A117.1-1992 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations, and the Guidelines;
4. ICC/ANSI A117.1-1998 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations, and the Guidelines;
5. HUD's Fair Housing Act Design Manual published in 1996 and revised in 1998;
6. Code Requirements for Housing Accessibility 2000 (CRHA), approved and published by the International Code Council (ICC), October 2000;
7. International Building Code (IBC) 2000, as amended by the IBC 2001 Supplement to the International Codes;
8. 2003 International Building Code (IBC), with one condition. Effective February 28, 2005, HUD determined that the IBC 2003 is a safe harbor, conditioned upon the International Code Council publishing and distributing the following statement to jurisdictions and past and future purchasers of the 2003 IBC;

ICC interprets Section 1104.1, and specifically, the exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7;

9. ICC/ANSI A117.1-2003 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations, and the Guidelines; and

10. 2006 International Building Code, published by ICC, January 2006, with the 2007 erratum (to correct the text missing from Section 1107.7.5), and interpreted in accordance with relevant 2006 IBC Commentary.

181. **42 U.S.C. §§12131-12133. Title II's regulations can be found at 28 C.F.R. § Part 35 et al. These regulations were updated in 2010 with technical updates in 2011. Please see: [Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability in State and Local Government Services](#) located at <http://www.ada.gov/regs2010/ADAregs2010.htm> **Title II's regulations (§ 35.190 Designated Agencies) designate HUD as the Federal Agency responsible for State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to state and local public housing, and housing assistance and referral.****
182. See 28 C.F.R. § Part 35 § 35.102 and [Indep. Housing Services v. Fillmore Center Associates, 840 F.Supp. 1328, 1344 \(N.D.Cal.1993\)](#). The court denied summary judgment to a city redevelopment agency on the plaintiff's claim that the agency's provision of bond financing to the owner of the project violates the ADA if the **housing** project discriminates against people with disabilities, which in this case focused on inaccessibility. The court stated that the provision of bonds is a "service" within the meaning of section 12132, focusing on the agencies contractual relationship with the developer in carrying out the agency's urban renewal program, and a person with a disability *is denied* the benefit of that service (the funding and provision of low income **housing**) if she or he is prevented from living in the low income **housing** because of his or her disability.
183. See 28 C.F.R. 35.150(c).
184. 28 C.F.R. § 35.130(g).
185. Title III's regulations can be found at 28 C.F.R. §, Part 36; See 28 C.F.R. § 36.104. The regulations were updated in 2010 and technical revisions were made in 2011. Please see: [Revised Final Title III Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability by Public](#)

[Accommodations and in Commercial Facilities \(HTML\)](http://www.ada.gov/regs2010/ADAregs2010.htm) at <http://www.ada.gov/regs2010/ADAregs2010.htm> Specifically, please see the definition of Public Accommodation contained in 28 C.F.R §36.104 Definitions.

186. See 28 C.F.R §36.104 Definitions and ADA Title III Technical Assistance Manual, January 1993, Supplement, p.1.

187. Id p. 3 and 28 C.F.R. §36.201(b)

188. 28 C.F.R. §36.201(b). This agreement doesn't exempt either party from their obligation under the law, but may be used as evidence to determine liability if someone gets sued.

189. 28 CFR §36.302, §36.303, §36.304, and §36.305

190. 28 CFR Subpart D-New Construction and Alterations

191. The most recent Section by Section Analysis of the ADA's Title II and Title III regulations make it clear when discussing the term disability that the question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. See [Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities \(HTML\)](http://www.ada.gov/regs2010/ADAregs2010.htm) at <http://www.ada.gov/regs2010/ADAregs2010.htm> and [Revised Final Title III Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities \(HTML\)](http://www.ada.gov/regs2010/ADAregs2010.htm) at <http://www.ada.gov/regs2010/ADAregs2010.htm> This is reflective of the Americans with Disabilities Act, as amended by as amended by , **PUBLIC LAW 110-325, SEPTEMBER 25, 2008**, and became effective 1/1/09, which states that mitigating measures other than "ordinary eyeglasses or contact lenses" are not to be considered in assessing whether an individual has a disability. This Act overturned a series of Supreme Court decisions and is consistent with the MA Supreme Judicial Court's interpretation of state law. In Massachusetts, the Supreme Judicial Court held that the determination of whether the person is substantially impaired in a major life activity must be made without regard for corrective devices. Dahill vs. Police

Department of Boston, SJC-08324, May 25, 2001. (Hereinafter, referred to as ADA, as amended).

192. However, the owner/agent of owner-occupied housing with four or fewer units cannot engage in discriminatory advertising practices. 42 U.S.C. §3603(b)(2); 24 C.F.R. § 100.10(c)(2).
193. MGL Chapter 151B, Section 1(11).
194. 42 U.S.C. §3603(b)(1); 24 C.F.R. § 100.10(c)(1). Other exemptions apply to religious organizations and private clubs, not open to the public, which may limit rental or occupancy to persons of the particular religion or to members of the club. Also, the regulations do not limit the applicability of “reasonable” local, state, or federal restrictions regarding maximum number of occupants in a dwelling. 24 C.F.R. 100.10(a).
195. See HUD/DOJ Statement on Reasonable Accommodation, pages 3 and 4, and HUD/DOJ Statement on Reasonable Modification, page 1. See also Frequently Asked Questions, page 2, 24 CFR §8.3 (504), 24 CFR §100.201 (FHA), 28 CFR §35.104 (Title II), 28 CFR §36.104 (Title III). Also see the ADA as amended.
196. See 24 CFR §8.3 (504), 24 CFR §100.201, 28 CFR §35.104 (Title II), and 28 CFR §36.104 (Title III) Definition of Regarded as Having a Disability Definition of Regarded of Having a Handicap (FHA)

(d) Is regarded as having an impairment means:(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation; (2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or 3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

Also see ADA, as amended, Sec. 12102. Definition of disability (3) (A)

"(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment

limits or is perceived to limit a major life activity. (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. “

197. ADA as amended and *Dahill vs. Police Department of Boston*, SJC-08324, May 25, 2001.

198. *Nicollet Towers, Inc. v. Virginia Georgiff*, FH-FL Rptr.&175, 1995 Minn. App. LEXIS 1394, 1995 WL 673015, (Minn. App. Nov. 14.1995). Also see HUD/DOJ Statement on Reasonable Accommodation, page 4, citing *Bragdon v. Abbott*, 524 U.S. 624, 691-92(98), holding that for certain people reproduction is a major life activity. Also see Section 3 of the ADA Amendments Act which expands the definition of major life activities by including two non-exhaustive lists, one that focuses on specific activities and the other that focuses on major bodily functions:

"(2) Major life activities.--

(A) In general.--For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions.--For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. “

199. Obviously, only a person who actually has a disability, or a history of a disability in some cases of mitigating circumstances, has a right to a reasonable accommodation.

200. The Americans with Disabilities Act (Subchapter V) amended Section 706(8) of the Rehabilitation Act of 1973, [29 U.S.C. 706(8)] by inserting after subparagraph (B) the following subparagraph:

(C)(i) For purposes of Title V, the term “individual with handicaps” does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps who:

I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

III) is erroneously regarded as engaging in such use, but is not engaging in such use; . . .

201. Subchapter V of the ADA (miscellaneous provisions), 42 U.S.C. §12210. Also see 28 C.F.R. § §35.131 and 28 C.F.R. § §36.209.

202. Illegal drug use is defined in reference to the Controlled Substance Act (CSA), 21 U.S.C. Section 801 et.seq, which categorizes marijuana as a schedule 1 substance, which means that the manufacture, distribution or possession of marijuana is a criminal offense. See HUD’s memorandum, written by Helen Kanovsky, titled “Medical Use of Marijuana and Reasonable Accommodation in Public and Assisted Housing, January 20, 2011. Also see HUD’s Memorandum, written by Ben Metcaff, titled “Use of Medical Marijuana in Multifamily Assisted Housing”, December 29, 2014.

203. 42 U.S.C. §3602(h). The FHAA’s legislative history states that the “[t]he definition of handicap is not intended to be used to condone or protect illegal activity.” H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988); reprinted in 1988, U.S.C.C.A.N. 2173, 2183. The House Report, together with the 1988, House and Senate floor statements, represent the fullest expressions of congressional intent with regard to the bill that became enacted into law. The Senate adopted the House bill (H.R. 1158) in substantial part, with only minor changes that are not relevant here, and did not publish an analogous committee report. 134 Cong. Rec. S.10454-5 (August 1, 1988).

In the Senate floor debate on the bill that became law, S.558, various Senators referred to the House Report to explain the meaning of the bill.

See, e.g., 134 Cong. Rec. S.10462 (August 1, 1988) (Sen. Kennedy); 134 Cong. Rec. S.10464 (August 1, 1988) (Sen. Harkin).

Also see HUD's regulations to the FHAA, Subpart D, §100.201. See *Peabody Properties, Inc. v. Sherman*, 638 N.E. 2d 906 (Mass. 1994).

Because someone with a disability may be using medical marijuana, HUD has considered and rejected whether accommodating someone's use of medical marijuana is reasonable. Rather, it has taken the position that accommodations allowing the possession, use, cultivation or distribution of medical marijuana constitute a fundamental alteration in public and assisted housing program's longstanding goal of providing decent, safe and sanitary housing that is free of illegal drugs and would also violate federal law. In addition, HUD has taken the position that federal law would pre-empt any state fair housing law requiring otherwise even in states, such as Massachusetts, which has a medical marijuana statute. See HUD's memorandum, written by Helen Kanovsky, titled "Medical Use of Marijuana and Reasonable Accommodation in Public and Assisted Housing, January 20, 2011. Also see HUD's Memorandum, written by Ben Metcaff, titled "Use of Medical Marijuana in Multifamily Assisted Housing", December 29, 2014.

204. See 42 U.S.C. §12210; 28 C.F.R. § 35131 (ADA) Subchapter IV of the ADA which amended the Rehabilitation Act; H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., at 22 (June 17, 1988) (FHAA).

205. Id.

206. Id.

207. See H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., at 22 (June 17, 1988) (FHAA).

208. 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.

209. H.R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 87, reprinted in 1990, U.S.C.C.A.N. 565, 596.

The quoted excerpt directly refers to the ADA's drug use provisions as they apply to the ADA itself. However, the Conference Report goes on to state that the phrase "current illegal use of drugs" has the same meaning under the ADA Amendment to the Rehabilitation Act, as under the ADA itself. Id. at 88-89, 1990 U.S.C.C.A.N. at 597-98.

210.H.R. Conf. Rep. No. 101-596, 101st Cong., 2nd Sess. 88-9, reprinted in 1990 U.S.C.C.A.N. 597-598. Courts have also interpreted the distinction between a current user and someone who is not a current user but rather an addict with a history of illegal drug use under *United States v. Southern Mgmt. Corp.*, 955 F.2d 914 (4th Cir. 1992) (which considered an addict who hadn't used illegal drugs for a year to have a history).

211.24 C.F.R. § 8.3. The Americans with Disabilities Act amended the Rehabilitation Act of 1973, so the two laws would conform. In accordance with one of the amendments, 42 U.S.C. §12211, the term "individual with handicaps" does not include any individual who is an alcoholic, whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

This amendment makes no mention of the exception applying outside the employment context. HUD has not amended its regulations to indicate that this exception no longer applies outside the employment context. As such, the current applicable section of this regulation provides:

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. For purposes of employment, this term does not include: Any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents the individual from performing the duties of the job in question, or whose employment, by reason of current alcohol or drug abuse, would constitute a direct threat to property or the safety of others; or any individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job. For purposes of other programs and activities, the term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents the individual from participating in the program or activity in question, or whose participation, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

- 212.42 U.S.C. 3604(f)(9); 24 C.F.R. § 100.202(d). Also see HUD/DOJ's Joint Statement on Reasonable Accommodations, Questions 4 and 5, beginning on page 4.
213. Preamble to ADA's Title II regulations. 56 Fed. Reg. 35701 (column 1) (7/26/1991). Appendix B to the current Title II regulations incorporates the 1991 Section –by-Section Analysis, to the Title II. According to the DOJ, the analysis remains “relevant to the extent it is not contradicted by the amendments to the rules or it provides guidance on provisions of the rules unchanged by the revised 2010 regulations.” See: [Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability in State and Local Government Services \(HTML\) | Revised Title II Rule: A Compilation... \(PDF\)](#), http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm
214. Americans with Disabilities Act, 42 U.S.C. 12102(2); 28 C.F.R. § 36.104; §504 of the Rehabilitation Act of 1973, 29 U.S.C. 706(8)(A) & (B); Fair Housing Amendments Act, 42 U.S.C. 3602(h); 24 C.F.R. § 100.201; 24 C.F.R. § 100.201.
215. ADA, 28 C.F.R. § 35.104; Fair Housing Amendments Act, 24 C.F.R. § 100.201.
216. In a federal case decided under the 1988, Amendments to the federal Fair Housing Act, the judge concluded that persons infected with the AIDS virus “pose no risk of its transmission to the community at large” and therefore may not be excluded from protection under the “direct threat” language. *Baxter v. City of Belleville*, 58 USLW 2152 (S.D. Ill. 8/25/89) No. 89-33354, reported in Fair Housing-Fair Lending Vol. 5, No. 6 at 17 Prentice Hall Law and Business, 12/1/89.
217. ADA, Preamble to Title II's regulations 56 Fed. Reg. 35701 (Column 1) (7/26/1991); Rehabilitation Act, 28 C.F.R. § 36.208; Fair Housing Act, 42 U.S.C. 3604(f)(9); 24 C.F.R. § 100.202(d).
218. 42 U.S.C. 3604(f)(9); 24 C.F.R. § 100.202(d).
219. ADA, 42 U.S.C. 12131(2); 28 C.F.R. § 35.104, Rehabilitation Act, 24 C.F.R. § 8.3.

220.53 Fed. Reg. 45001 (Column 3) (11/7/88) and H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess. at 29-30 (1988). Also see the preamble to ADA's Title II regulations, 56 Fed. Reg. 35701 (1st Column) (7/26/1991). Appendix B to the current Title II regulations incorporates the 1991 Section – by-Section Analysis, to the Title II. According to the DOJ, the analysis remains “relevant to the extent it is not contradicted by the amendments to the rules or it provides guidance on provisions of the rules unchanged by the revised 2010 regulations.” See: [Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability in State and Local Government Services \(HTML\) | Revised Title II Rule: A Compilation... \(PDF\)](#),

http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm

221. See HUD/DOJ Statement on Reasonable Accommodation, question 5, p.4

222. H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., 29-30. (1988).

223. See HUD/DOJ Statement on Reasonable Accommodation, Question 5, page 5. Also see *Wirtz Realty Corp. v. Freund*, No. 1-97-3573, 1999 WL 418748 (Ill. App. 3 Dist. June 23, 1999); *Waterbury Housing Authority v. Lebel*, 2 NDLR 53 (Conn. Super. Ct. 1991).

224. See HUD/DOJ Statement on Reasonable Accommodation, Question 5., page 5 and page 6. There are also a series of cases that require a housing provider to consider reasonable accommodation when an eviction of a tenant with a disability is based on her violent actions. See *Roe v. Sugar River Mills Associates*, 820 F.Supp. 636 (D.N.H. 1993) (owner can only treat a tenant with a disability as exempt from protections under the Fair Housing Amendments Act, as a direct threat to health and safety of other tenants, if the owner has first made reasonable efforts to accommodate his or her disability); *Roe v Housing Authority of City of Boulder*, 909 FSupp 814(DColo 1995) (housing authority can't evict a tenant with a disability based on violent behavior when it hadn't tried to provide a reasonable accommodation and unless no reasonable accommodation would eliminate or acceptably minimize the risk); *Arnold Construction, A.L.L.C. v. Hicks*, 621 N.W.2d 171 (S.D. 2001); *Cornwell & Taylor LLP v. Moore*, 2000 WL 1887528, (Minn. App. 20001) (The landlord failed to show that no

reasonable accommodation would eliminate or acceptably minimize any risk the tenant might pose); *Douglas v. Kriegsfeld*, 884 A.2d 1109 (D.C. 2005)(This case permitted an eviction of a tenant with a disability after factual consideration on Reasonable accommodation and the determination that no reasonable accommodation could ameliorate the situation sufficiently to protect the health and safety of others). A more recent case which cited many of the cases listed above for support is the Boston Housing Authority v. Bridgewater, which is discussed herein (When a tenant poses a direct threat to others and requests a reasonable accommodation, the housing provider must either show “the failure of an accommodation instituted at the request of the tenant”, or show that “no accommodation will acceptably minimize the risk the tenant poses to other residents.”

225. *School Board of Nassau County v. Arline*, 480 U.S. at 287088, 107 S.Ct. at 1130-31(1987).

226. See H. Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess., at 29 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2190 (1988).

(T)he direct threat requirement incorporates the *Arline* standard, and a dwelling need not be made available to an individual whose tenancy can be shown to constitute a direct threat and significant risk of harm to health or safety or others. If a reasonable accommodation could eliminate the risk, entities covered by this Act are required to engage in such accommodation pursuant to 142 U.S.C. § 3604(f) (311).

Also, Under the ADA, the definition of disability incorporates reasonable accommodation. See qualified individual with a disability, 42 U.S.C. § 12131(2). Likewise, the ADA’s Title II regulations regarding Direct Threat (28 C.F.R. § § 35.139), Title III regulations regarding Direct threat (28 CFR §36.208) and the 1991 Preamble and Section-by-Section Analysis to these regulations make it clear that a determination of Direct Threat must include consideration of a reasonable accommodation. See: [Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability in State and Local Government Services \(HTML\) | Revised Title II Rule: A Compilation... \(PDF\)](#), http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm and

Appendix B to the current Title II regulations incorporates the 1991 Section – by-Section Analysis, to the Title II. According to the DOJ, the analysis remains “relevant to the extent it is not contradicted by the amendments to the rules or it provides guidance on provisions of the rules unchanged by the revised 2010 regulations.” See: [Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability in State and Local Government Services \(HTML\) | Revised Title II Rule: A Compilation... \(PDF\)](#),

http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm

227. *School Board of Nassau County v. Arline*, 480 U.S. at 287088, 107 S.Ct. at 1130-31(1987).
228. 134 Cong. Rec., §1064, Daily Ed. August 1, 1988 (Statement of Senator Harkin).
229. 24 C.F.R. § 8.4(b)(1)(ii).
230. 24 C.F.R. § 8.4(b)(1)(iii).
231. 24 C.F.R. § 8.4(b)(1)(iv).
232. 24 C.F.R. § 8.4(b)(2).
233. 24 C.F.R. § 8.4(d).
234. 42 U.S.C. §12131-12133.
235. 42 U.S.C. §3604 (f)(1); 24 C.F.R. § 100.202. In addition to these protections, which apply only to disability discrimination, also see additional sections that govern discrimination on the basis of other protected classes, in regard to selling or renting a dwelling, which now apply to persons with disabilities. 24 C.F.R. § 100.50(b)(1) and 100.60 (Fair Housing Act);24 C.F.R. § 8 (Section 504) and 28 C.F.R. § 35.130 (ADA Title II), which doesn't specifically address housing per se, but rather programs and activities of a public entity.
236. 42 U.S.C. §3604(f)(2); 24 C.F.R. § 100.202(b); 24 C.F.R. § 100.50(b)(1) and 100.60 (Fair Housing Act);24 C.F.R. § 8 (Section 504) and 28 C.F.R. § 35.130 (ADA Title II), which doesn't specifically address housing per se, but rather programs and activities of a public entity.

237. For example, the use of chronology in re-opening a waiting list can have a disparate impact on applicants with disabilities. See the letter in the appendix from the Director of Fair Housing and Equal Opportunity in New England to PHAs administering Section 8 programs.
238. HUD, for example, has the 811 Supportive Housing Program. See the following website for information on this program: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/prog_desc/disab811 Also, see Housing and Community Development Act, §622(a)7(a)(1).
239. See HUD/DOJ Statement on Reasonable Accommodation, Question 11, Example 1, page 9. Also see *HUD v. Country Manor Apartments*, HUD ALJ 05-98-1649-8, Sept. 2001. See related case of *HUD v. Twinbrook Village Apartments*, HUD ALJ 02-00-0256-8, Nov. 2001. (Requiring wheelchair users to procure renter's insurance to indemnify the landlord against any injury in the construction or use of a ramp was discriminatory.)
240. This requirement is specifically discussed in PIH Non-Discrimination Notice, page 5.
241. See, for example, *Alexander v. Choate*, 469 U.S. 287, 292-299 (1985), where the U.S. Supreme Court concluded that the exclusion of a person because of lack of access, could be considered a violation of Section 504, even though there was no intent to exclude a person with a disability. HUD adopted the effect test for its §504 regulations, relying on this case. 53 Fed. Reg. 20220 (June 2, 1988).
242. (54 Fed. Reg. 3235) (1st Column) (1/23/89). See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), review declined in part and judgment aff'd, 109 S.Ct. 276 (1988); *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. denied; 434 U.S. 1025 (1978); *U.S. v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3rd Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Betsy v. Turtle Creek Assocs.*, 736 F.2d 983,986 (4th Cir. 1984); *U.S. Peltzer Realty Co., Inc.* 484 F.2d 438, 443 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974); *Arthur v. City of Toledo*,

782 F.2d 565, 574 (6th Cir. 1986); *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982).

In addition, the Eleventh Circuit has held itself bound by the prior holdings of the Fifth Circuit, which rejected the intent standard in the *Peltzer Realty* case. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). The First Circuit in *Langlois (etc) v. Abington Housing Auth. (etc.)*, No. 99-1198 (2000) also found this reasoning persuasive.

The requirement, within the 1988 Amendments, that a person with a disability be provided a reasonable accommodation, further supports an “effects” test rather than an “intent” test. Congress made it clear that a landlord’s policies or practices, which may be neutral on their face, may have to be modified by making a reasonable accommodation if the effect of the policies or practices is discriminatory. See H.Rpt. 100-711 on H.R. 1158, 100th Cong. 2d Sess 23 (1988) (prohibiting of special restrictive covenants “which have the effect of excluding” persons with disabilities).

However, until recently HUD has declined to adopt the effects test.

HUD’s [regulation](#) formalizing the use of the disparate impact theory to bring claims of housing discrimination under the Fair Housing Act is titled “Implementation of the Fair Housing Act’s Discriminatory Effects Standard; Final Rule” and it was published in Federal Register/Vol. 78, No. 32/Friday, February 15, 2013. This rule came under attack for exceeding the plain language of the Fair Housing Act and HUD exceeding its authority. The Supreme Court, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* (slip opinion, No13-1371, 6.26.2015) affirmed that “disparate impact claims are cognizable under the Fair Housing Act.” The Court in this case referenced HUD’s rule and remanded the case to the lower court for a decision on the merits.

243. 24 C.F.R. § 100.204 (FHA); 24 C.F.R. § 8.4, 8.24, and 8.33 (504); 28 C.F.R. § 35.130(b)(7) (Title II); 28 CFR 36.302 (Title III).

244. 24 C.F.R. § 100.204 (FHA), 24 CFR 8.6 (504), 28 CFR 35.160(Title II) and 28 C.F.R. §36.303231; 24 C.F.R. § 100.203 (FHA) 24 C.F.R. § 8.4, 8.24 (504); 28 C.F.R. §35.149-150(Title II); 28 C.F.R. § 36.304 (Title III).

245. 24 C.F.R. § 8.24(a)(2)(504); 28 C.F.R. § 35.130(b)(7) (Title II; and 28 C.F.R. § 35.149(a)(3). Also see DOJ Statement on Reasonable

Accommodation, Question 7, page 7 and DOJ Statement on Reasonable Modification, Question

246. 24 C.F.R. § 8.24(a)(2); 28 C.F.R. § 35.149(a)(3). Title III uses a different standard. Public Accommodations must remove all readily achievable barriers. See 28 C.F.R. § 36.304.

247. 24 C.F.R. § 100.204 (FHA); 24 C.F.R. §8.4, 8.24, and §8.33 (504); 28 C.F.R. §35.130(b)(7) (Title II); 28 C.F.R. §36.302 (Title III).

248. 24 C.F.R. § 100.204 (FHA); 28 C.F.R. § 35.130(b)(7) (Title II).

249. 24 C.F.R. § 8.4, § 8.24, and §8.33 (504)

250. Also note that the Memorandum of Understanding between HUD and Justice acknowledges that housing that does not receive federal dollars may be required to grant a reasonable accommodation that involves costs so long as the costs do not pose an undue burden and the requested accommodations does not constitute a fundamental alteration of the provider's operation. See HUD/DOJ Statement on Reasonable Accommodation Question 9, pages 8-9.

251. 24 C.F.R. § 8.24(a)(2) (504); 28 C.F.R. § 35.130(6)(7) (Title II). Also see HUD/DOJ Statement on Reasonable Accommodation, page 8.

252. 24 C.F.R. §8.24; 28 C.F.R. §35.149-150. The federal Fair Housing Amendments Act provides that, in the case of a rental, if a modification in a unit, not a common area, will materially alter the marketability of the housing, a landlord may condition permission for a modification, on the tenant agreeing to restore or pay for the cost of restoring the interior of the premises to the condition that existed prior to the modification, reasonable wear and tear excepted. The federal law also specifies that a landlord may not increase the customary security deposit but may, under certain circumstances, require that an escrow account for restoration purposes be established by the tenant [24 C.F.R. §100.203(a)]. Under the federal law, a landlord may condition permission for modification on the tenant providing a "reasonable description" of the proposed modification, the work being done in a workmanlike manner and that any required permits will be obtained [24 C.F.R. § 100.203(b)]. Also note that the Memorandum of Understanding between HUD and Justice acknowledges that housing that does not receive federal dollars may be required to grant a reasonable accommodation that

involves costs so long as the costs do not pose an undue burden and the requested accommodations does not constitute a fundamental alteration of the provider's operation. See HUD/DOJ Statement on Reasonable Accommodation, Question 9, pages 8-9.

253. 24 C.F.R. § 8.24(a); 28 C.F.R. § 35.150.

254. 24 C.F.R. § 8.23. For example, in one Section 504 case, a tenant, as a result of auditory hallucinations, struck at the walls of her apartment with a broomstick and other objects. While this conduct would likely justify eviction of a tenant without a disability, the court noted that Section 504 requires that the landlord make a reasonable accommodation if such an accommodation would alleviate the destructive conduct. The court, in an opinion affirmed by the Massachusetts Supreme Judicial Court, concluded that an accommodation of additional time to pursue therapy may be "reasonable" and therefore required, given that the cost of repairing the premises was relatively modest, the landlord was entitled to reimbursement from the federal Section 8 program and there was no evidence that other tenants were affected by the tenant's conduct. *Citywide Associates v. Penfield*, No. 89-SP-9147-S, Hampden Division of the Housing Court Department (4/21/89), aff'd, 409 Mass. 140 (1991). Also See HUD Handbook 4350.3, Exhibit 2-6: Examples of Undue Financial and Administrative Burden, beginning page 255.

255. HUD Handbook 4350.3, paragraph 2-43, Limits on Obligations to Provide Reasonable Accommodations, beginning page 2-39 and Exhibit 2-5 and 2-6, pages 2-54 and beginning page 255 respectively.

256. The Report of the HUD Task Force on Occupancy Standards in Public and Assisted Housing recommended that HUD require assisted housing providers and public housing authorities to adopt a reasonable accommodation procedure that followed the guidelines set forth in this Handbook. (pp.18-25.) HUD, however, hasn't done this. HUD/DOJ Statement on Reasonable Accommodation, Question 13, beginning page 10.

257. Information on the availability of this procedure should be provided at least during application intake, applicant screening, orientation of new residents, recertification, notice of lease violation and notice of lease termination.

Neither Courts nor regulations have explicitly required such notice; however, many advocates believe the general notice requirements contained in the laws require such notice. HUD's letter to MassHousing, which is in the appendix, indicates this is true. Moreover, giving such notice may lead to a solution in some cases and provide some protection from liability if a case goes to court.

258. If you decide that an accommodation is reasonable, you should implement it in a timely fashion. How quickly you can implement an accommodation will depend on the nature of the accommodation. See HUD/DOJ Statement on Reasonable Accommodation, Question 15, page 11.

259. The review procedure will depend on a number of factors: whether the person with a disability is an applicant or tenant; how many employees a housing provider has, whether the housing provider is covered by the ADA; and whether the non-public housing provider employs fifteen or more people. 24 C.F.R. §8.53. In addition, state law or administrative regulations may impose regulations. For example, all applicants for MassHousing-financed housing have a right to a rejection conference. Applicants for state-assisted housing have the right to an informal conference followed by a Massachusetts Department of Housing and Community Development review. If the person is an applicant for non-MassHousing-assisted housing and non-state-assisted housing, the applicant is entitled only to the informal review in place under program regulations for applicants denied housing in any HUD-assisted housing. You should therefore use your current review procedures. If you employ more than 50 people and you are covered by Title II, you are required by Title II of the ADA (§35.107) to adopt grievance procedures for anyone denied a reasonable accommodation, including applicants.

If you are a recipient of federal funds and employ more than fifteen employees, you are required by §504 (§8.53) to adopt grievance procedures that have appropriate due process standards for anyone other than applicants denied a reasonable accommodation. Likewise, if you are covered by Title II and employ more than fifty (50) people you must do the same. Public Housing Authorities may utilize the grievance procedure that they already have in place for tenants to dispute the housing provider's

action or failure to act, involving the tenant's lease or the housing authority's actions, which adversely affect the tenant.

260. If you are covered by Section 504 and have 15 or more employees, you must have such a coordinator. See 24 C.F.R. §8.53. Under ADA Title II, you must have a coordinator if you have 50 or more employees. See 28 C.F.R. §35.107.

261. HUD/DOJ Statement on Reasonable Accommodation, Question 12 and Question 13, beginning on page 10. The Court in the Boston Housing Authority vs. Bridgewaters decision (cited herein) relied on this guidance when determining that Bridgewaters requested an accommodation despite not using the words.

262. HUD/DOJ Statement on Reasonable Accommodation, Question 12, page 10.

263. 28 C.F.R. § 35.160-35.164; 24 C.F.R. § §8.6. Also see HUD Handbook 4350.3, paragraph 2-29, Communicating with Persons with Disabilities, beginning page 2-23 and PIH Accessibility Notice, page 16.

264. 24 C.F.R. §8.28. Also see PIH Non-Discrimination Notice, beginning on page 8.

265. Id.

266. 24 C.F.R. §8.28. Also see PIH Non-Discrimination Notice page 9 and Accessibility Notice, page 12.

267. Id. Also see 24 C.F.R. §982.505(d) and PIH 2010-11(HA), Requests for Exception Payment Standards for Persons with Disabilities as a Reasonable Accommodation, April 13, 2010 which cross references PIH 2008-13(HA), 24 C.F.R. §982.505(d) and 24 C.F.R. §982.503©(2)(ii) and PIH 2011-19, "Extension of Notice 2010-11 (HA) Requests for Exception Payment Standards for Persons with Disabilities as a Reasonable Accommodation," issued April 22, 2011. This Notice extends procedures in Notice 2010-11 until HUD issues any additional guidance. It does not make additional changes to procedures.

268. 24 C.F.R. §8.5.

269. PIH Nondiscrimination Notice (**PIH2010-26 (HA)**, beginning page 2, PIH Accessibility Notice, page 3, Guidance on non-discrimination and equal opportunity requirements for PHAs, **PIH2010-26 (HA)**, page 7..
270. HUD Handbook 4350.3, paragraph 2-34, Owner Self-Evaluation, beginning page 2-31.
271. PIH Nondiscrimination Notice (**PIH2010-26 (HA)**, pg.3, PIH Accessibility Notice, page 3.
272. Id.
273. 24 C.F.R. § 8.24(d); 24 C.F.R. § 8.25(c) and .
274. 28 C.F.R. § 35.150(c).
275. 28 C.F.R. § 35.150(d).
276. 24 C.F.R. § 8.53(b).
277. 24 C.F.R. § 8.53(a).
278. 24 C.F.R. § 8.53(b).
279. 24 C.F.R. § 8.53(a).
280. 24 C.F.R. § 8.56(c)(3).
281. 24 C.F.R. § 8.56(3).
282. The statute itself contains no time limit for filing suit; in setting a limit, courts look to the most closely analogous statute of limitations in the state where the suit is being filed. In Massachusetts, the three-year statute of limitations for tort actions (M.G.L. c.260 §2A) has been held to be the appropriate statute of limitations for federal, civil rights actions. *Brown v. City of Salem*, 40 EDP 36, 348 (D. Mass. 1986). Also see *Johnson v. Rodriguez*, 943 F.2d 104 (1991); *Street v. Vose*, 936 F.2d 38(1991); *Doty v. Sewall*, 784 F.2d 1 (1986).
283. 42 U.S.C. §3610 (a)(1)(A)(i); 24 C.F.R. § 103.15.
284. 42 U.S.C. §3610(f)(1); 24 C.F.R. § 103.100(a). HUD must notify the aggrieved person and respondent of the referral by certified mail. The notice must include advice concerning the recipient's rights to commence a civil action, as well as all other procedural rights and time limits. 24 C.F.R. § 103.100(b).

285. 42 U.S.C. §3610(f)(2); 24 C.F.R. § 103.1105(a) and 103.110.

286. 42 U.S.C. §3610(g)(1); 24 C.F.R. § 103.200 and 103.225.

287. 24 C.F.R. § 103.230(c).

288. 42 U.S.C. §3610(b); 24 C.F.R. § 103.300. HUD may terminate its efforts to conciliate the complaint if the respondent fails or refuses to confer with HUD, the complainant or respondent fail to make a good faith effort to resolve any dispute, or HUD finds, for any reason, that conciliation is not likely to work. 24 C.F.R. § 103.325.

289. HUD may terminate conciliation efforts if the respondent fails to confer with HUD, either party fails to make a good faith effort to resolve any dispute, or HUD finds that voluntary agreement is not likely to result. 24 C.F.R. § 103.325(a). HUD must terminate conciliation if the aggrieved person has commenced a civil action and the trial in the action has commenced, unless the court specifically requests HUD's assistance. 24 C.F.R. § 103.325(b).

290. 42 U.S.C. §3610(b)(2); 24 C.F.R. § 103.310(b)(1). HUD must approve the agreement if: 1.) the complainant and respondent agree to the relief accorded the aggrieved person; 2.) the provisions of the agreement will adequately vindicate the public interest; or 3.) HUD is the complainant and all aggrieved persons named in the complaint are satisfied with the relief provided.

A conciliation agreement may provide for binding arbitration. 42 U.S.C. §3610(b); 24 C.F.R. § 103.315(b).

Nothing said or done, in the course of conciliation, may be made public or used as evidence in a subsequent proceeding under the federal Fair Housing Amendments Act, without the written consent of the persons concerned. However, the conciliation agreement will be made public, unless the aggrieved person and respondent request non-disclosure and HUD determines that disclosure is not required for purposes of the FHA. 24 C.F.R. § 103.330(a) & (B).

291. 24 C.F.R. § 103.315(a). In addition, the following types of provisions may be sought for the vindication of the public interest: 1.) elimination of the discriminatory housing practice; 2.) prevention of future violations; 3.) remedial affirmative activities to overcome discriminatory housing practices;

4.) reporting requirements; and 5.) monitoring and enforcement activities.
24 C.F.R. § 103.320.

292. 42 U.S.C. §3610(c); 24 C.F.R. § 103.335.

293. 42 U.S.C. §3610(e); 24 C.F.R. § 103.500.

294. 42 U.S.C. §3610(g); 24 C.F.R. § 103.400(a).

295. 42 U.S.C. §3610(h); 24 C.F.R. § 103.400(a)(1)(i).

296. 42 U.S.C. §3612(a); 24 C.F.R. § 103.410(a).

297. The individual electing a judicial determination must give notice to HUD and to all other complainants and respondents. 42 U.S.C. §3612(a); 24 C.F.R. § 103.410(b). Any person aggrieved, with respect to the issues to be determined, may intervene as of right in the action. 42 U.S.C. §3612(0)(2).

298. 24 C.F.R. § 103.410(d).

299. 42 U.S.C. §3612(0)(1).

300. 42 U.S.C. §3613.

301. If it is impracticable to hold a hearing within 120 days, the ALJ must notify HUD, the aggrieved person, and all parties of the reasons. 42 USC §3612(g)(1); 24 C.F.R. § 104.700(a).

302. 42 U.S.C. §3612(c); 24 C.F.R. § 104.200(b). If impracticable, the ALJ must notify the Secretary of HUD, the complainant and you in writing of the reasons therefore.

303. If impracticable, the ALJ must notify the Secretary of HUD, the complainant and you in writing of the reasons. 42 U.S.C. §3612(g)(2); 24 C.F.R. § 104.910(a) & (b).

304. 42 U.S.C. §3612(g)(3); 24 C.F.R. § 104.910(b). To vindicate the public interest, the ALJ order may include assessment of a civil penalty against respondent. 42 U.S.C. §3612(g)(3); 24 C.F.R. § 104.910(b)(3).

305. 24 C.F.R. § 104.930(a).

306. 42 U.S.C. §3612(h); 24 C.F.R. § 104.930(a).

307. 42 U.S.C. §3612(i); 24 C.F.R. § 104.950(a).

308. 42 U.S.C. §3612(l); 24 C.F.R. § 104.950(b).

- 309.28 C.F.R. § 35.107(b).
- 310.28 C.F.R. § 35.107(a).
- 311.M.G.L. c.151B
312. Chapter 722, Mass. Acts of 1989, (1/13/90), amending several Chapters of the Massachusetts General Laws, including especially Chapter 151B; the MCAD's regulations appear at 804 C.M.R. 2.00.
- 313.M.G.L. c.151B, §4(6), 804 CMR 02.03.
314. Id.
- 315.M.G.L. c.151B, §1(11).
- 316.M.G.L. c.151B §1(17); 804 C.M.R. 2.03(2).
- 317.M.G.L. c.151B §1(17) and MCAD "AIDS POLICY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION," issued January 1986; Revised May 1991.
- 318.M.G.L. c.151B §1(17).
319. In three 1999 cases the US supreme Court decided that when a person is taking measures to correct for a physical or mental impairment, both the negative and positive effects of those measures must be considered when determining whether a person meets the ADA definition of "substantially impaired in one or more major life activities". See *Sutton V United Airlines, Inc.*, 119 S. Ct 2139 (1999); *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999); *Albertson's, Inc., v. Kirkinburg* 119 S. Ct. 2162 (1999). However, in Massachusetts, the Supreme Judicial Court held that the determination of whether the person is substantially impaired in a major life activity must be made without regard for corrective devices. *Dahill vs. Police Department of Boston*, SJC-08324, May 25, 2001.
320. Comparable language (regarding threats to individuals and property) was at one time included in the state fair housing bill. However, the language was removed on the House floor by amendments made a few days prior to final enactment. Compare Section 18, lines 82-86 of House Bill No. 6477 with Section 18 of House Bill No. 6569. This latter bill's language was in the bill numbered S. 1911 which was signed by the Governor.
321. Boston Housing Authority v. Emmit Bridgewaters, cited herein.

322. M.G.L. c.151B §4,7A(2); 804 C.M.R. 2.03(3).

323. Id. The statute actually says this applies to “ten or more units, or contiguously located housing consisting of ten or more units” and in Section 1 Definition 12. , defines the term “contiguously located housing” to mean:

(1) housing which is offered for sale, lease or rental by a person who owns or at any time has owned, or who otherwise controls or at any time has controlled, the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), and which housing is located on such land, or (2) housing which is offered for sale, lease or rental and which at any time was one of ten or more lots of a tract whose plan has been submitted to a planning board as required by THE SUBDIVISION CONTROL LAW, as appearing in sections eighty-one K to eighty-one GG, inclusive, of chapter forty-one.

324. M.G.L. c.151B §4,7A.(3); 804 C.M.R.2.03(4).

325. M.G.L. c.151B §4, 1 and (3).

In accordance with this statute, factors to be considered in a determination include “the nature and cost of the accommodation or modification needed, the extent to which the accommodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner or other person having the right of ownership, including but not limited to, the number and type of housing units, size of budget and available assets, and the ability of the owner or other person having the right of ownership to recover the cost of the accommodation or modification through a federal tax deduction.” Also, there is a Ten percent limit that an owner or other person having the right of ownership is required to pay for a modification in order to make units fully accessible to persons using a wheelchair.

326. Grubba v. Bay State Abrasives, 803 F.2d 746 (1st Cir. 1986).

327. Conway v. Boston Edison Co., 745 F. Supp. 773 (D. Mass.1990).

328. M.G.L. c 93, §103; M.G.L.c.156, Mass. Acts of 1990. In 1989 and 1990, the Massachusetts legislature enacted two laws, commonly known as the Equal Rights Laws, which provide a civil remedy for people who have been denied certain rights on the basis of race, color, religion, national origin, sex, age, or

disability. M.G.L. c.93, §102; M.G.L. c.332, Mass. Acts of 1989. M.G.L. c.93, §103; M.G.L. c.156, Mass. Acts of 1990.

The two laws are almost identical. Both are closely modeled on a federal civil rights law enacted after the Civil War, to ensure to African-American people the full rights of U.S. citizens. 42 U.S.C. §1981. The 1989 Massachusetts Equal Rights law, M.G.L. c.93, §102, was enacted at a time when it appeared likely that the U.S. Supreme Court was about to issue a decision limiting the scope and effectiveness of the federal civil rights law. The state law was passed to ensure that Massachusetts citizens would continue to enjoy the rights secured by the federal law, and at the same time, expanded those rights to include people discriminated against on the basis of national origin, religion, and sex. The 1990 law, M.G.L. c.93, §103, was adopted to extend the same protections to people discriminated against on the basis of age and disability.

329. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

330. The specific provisions of E.O. 246 which relate to persons with disabilities in housing accommodations are found in Article XI.

In addition, local ordinances may prohibit discrimination in housing against persons with disabilities. For example, a Boston ordinance establishing a Boston Fair Housing Commission protects persons from housing discrimination on the basis of disability. City of Boston Code, Ordinances, Chapter X, Sections 10-3.2 and 10-3.3. The Boston Fair Housing Commission enforces this ordinance. This Commission's address is 1 City Hall Square, Suite 966, Boston, Massachusetts 02201-2041. The Commission's telephone number is (617) 635-4408.

331. M.G.L. c.22, §13A.

332. 521 CMR A-E.

333. M.G.L. c.151B, §5; 804 C.M.R. 1.1-1.18.

334. M.G.L. c.151B, §5.

335. 804 C.M.R. 1.03(1).

336. 804 C.M.R. 1.09(5).

337. 804 C.M.R. 1.13(1).

338.804 C.M.R. 1.21.

339.M.G.L. c.151B, §9.

340.804 C.M.R. 1.23(1).

341.M.G.L. c.151B, §6.

342.M.G.L. c.151B, §6.

343.M.G.L. c.30A, §14.

344. See M.G.L. c.30A, §14(7).

345.M.G.L. c.151B, §5, as amended by c.722 of the Acts of 1989.

346.M.G.L. c.151B, §9, as amended by c.722 of the Acts of 1989.

347. Grubba v. Bay State Abrasives, 803 F.2d 746 (1st Cir. 1986).

348.M.G.L. c.12, §11H-I.336 M.G.L. c.22, §13A.

APPENDIX

TABLE OF CONTENT

1. Sample Reasonable Accommodation Policy	Page 217
2. Sample Forms	PAGE 225
Notice Of Right To A Reasonable Accommodation	PAGE 225
Request For A Reasonable Accommodation	PAGE 225
Consent For The Release Of Information Necessary To Process A Reasonable Accommodation	PAGE 230
Letter To A Tenant For A Meeting About A Reasonable Accommodation	PAGE 232
Request To Tenant For More Information Or Verification Re: A Reasonable Accommodation Request	PAGE 234
Denial Of Request For Reasonable Accommodation	PAGE 236
Reasonable Accommodation Approval Notice	PAGE 239
Letter To Verification Source For A Reasonable Accommodation Request	PAGE 241
Consent For The Release Of Information Necessary To Process A Reasonable Accommodation	PAGE 243
Verification Of Need For A Reasonable Accommodation	PAGE 245
Request For Consideration Of Mitigating Circumstances	PAGE 248
Mitigating Circumstances Verification	PAGE 252
Accessible Units: Sample Policy Language	PAGE 255
Hud Required Sample Notification Of Nondiscrimination On The Basis Of Disability Status: Exhibit 2-3 Of The 4350.3 Rev-1	PAGE 256
Lease Addendum	PAGE 257

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Housing Reference

PAGE 259

3. REASONABLE ACCOMMODATION REQUESTS: DETERMINING UNDUE FINANCIAL AND ADMINISTRATIVE AND FUNDAMENTAL CHANGE ON THE PROGRAM

Page 263

4. LETTER FROM HUD TO MASSHOUSING REGARDING NOTICE OF RIGHT TO REASONABLE ACCOMMODATION

Page 275

5. LETTER FROM HUD REGIONAL OFFICE OF FAIR HOUSING REGARDING OPENING WAITING LISTS

Page 279

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Appendix 1

SAMPLE REASONABLE ACCOMMODATIONS POLICY

POLICIES

Note: Management companies and housing authorities whose properties receive federal funds must designate a 504 Coordinator (“Responsible employee”) if they have 15 or more employees. If their properties receive funds or are financed only through state or local government entities, they must designate an ADA Coordinator if they have 50 or more employees. Even if companies or housing authorities are not obligated to designate such a person, it is good business practice to do so in order to ensure knowledgeable and consistent application of 504, ADA and state disability fair housing requirements.

1. The 504/ADA Coordinator (delete 504 if not applicable) is **[name, phone, TTY, e-mail, fax]**.
2. The **[name of org]** does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status, marital status, veteran status, public assistance, disability, genetic information, gender identity ((or any other class protected by state or local law, in the access or admission to its programs or employment or in its programs, activities, functions or services. (Note: check local ordinances for additional protected classes.)
3. The _____ **[development, management company, housing authority]** is covered by **[delete those that do not apply]** Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, Titles II and III, the Fair Housing Act and Massachusetts Chapter 151B as well as other state and local fair housing acts which require reasonable accommodation to persons with disabilities as defined in those laws. Herein

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



the term reasonable accommodation is inclusive of changes in rules, policies, procedures, services, and physical modifications.

4. The _____ **[development, management company, housing authority]** will make a reasonable accommodation for people with disabilities when an accommodation is necessary to insure equal access to **[the development or housing authority]**, its amenities, services and programs. Reasonable accommodations include changes to the building, grounds or an individual unit and changes to rules, policies, practices, procedures and services.

5. Accommodations will be made up to the point of structural infeasibility, undue financial and administrative burden or requiring changes fundamental to the program. If **[the development or housing authority]** cannot afford the full cost of an accommodation, the **[development or housing authority]** will meet with the applicant/resident to determine the best way to use the funds that are available to address the barrier. Likewise, if the accommodation poses a fundamental change in the nature of the housing program, the **[development or housing authority]** will discuss alternative accommodations.

6. The definition of a person with a disability for purposes of a reasonable accommodation follows the definition in Section 504, the ADA, the federal Fair Housing Act, Massachusetts Chapter 151b and any other applicable statutes: a person with a physical or mental impairment that substantially limits one or more activities of daily living, has a history of such an impairment or is regarded as having such an impairment.

7. Notice of the right to reasonable accommodation shall be posted in the management office(s) and included with all applications, lease violation notices, eviction notices and recertifications. Such a notice will also be included in the Resident Handbook and other relevant resident publications. Such notices shall be in large print and posted or included in a manner that is

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



readily seen by persons with all disabilities. Such notices will also be available in other formats for persons who cannot read them. Also, we will translate this important document into other languages for applicants and residents who do not speak or understand English well, (have "limited English proficiency" because their primary language is not English), when Title VI of the Civil Rights Act of 1964 requires us to do so or when Title VI does not require us to do so we will attach a notice in multiple languages informing applicants and residents that this is an important document and that we will provide free language assistance.

8. Reasonable accommodation requests will be processed in the order in which necessary documentation is received.

PROCEDURES

1. Applicants, tenants and third parties acting on such persons' behalf, are requested to fill out a written Reasonable Accommodation request form which may be obtained from **[position, office, etc]**. Staff will assist applicants or residents who need such assistance and will accept requests in alternate format if necessary because of a disability. Verbal requests are also accepted, but may sometimes lead to confusion so written or other alternate format requests are recommended.
2. Routine requests, such as assistance in reading or completing forms, alternate format materials, etc. do not require documentation.
3. All requests will be processed by **[site manager, resident service coordinator, 504/ADA coordinator - specify title, name, address, phone, fax, e-mail, TTY]**.
4. The following types of requests will not require documentation except in unusual circumstances:
 - simple, routine requests for assistance as described above

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



- any request where the disability and need is obvious or known to the housing provider, such as
 - sign language interpreters
 - alternate format requests
 - need for an accessible unit for a family member whose need for the accessible features of the unit is obvious and will be continuous. Note: Some persons who do not use wheelchairs may nonetheless need the features of an accessible unit. For a person who does not use a wheelchair, but whose need for the features as a result of a disability is obvious, no documentation is required.)
 - guide or service animals.
 - grab bars
 - All other requests, in which the disability status, need and/or likelihood that the request will resolve problem is not known or obvious, will require verification of any of the missing elements of information required to make a reasonable accommodation decision.
5. **[Management company or housing authority]** strongly recommends that applicants or residents use **[management company or housing authority]** verification form in order to avoid delays. Management reserves the right to require documentation on a verification of need and release form provided by **[management company or housing authority]** if other forms of documentation are not sufficient to document need. It is the applicant or resident's responsibility to secure such documentation. Documentation must come from a reliable source with sufficient professional and personal knowledge of the applicant to answer the applicable questions.
6. As soon as **[site manager, resident service coordinator, 504/ADA coordinator - select title]** receives a Reasonable Accommodation request, he or she will send the applicant's/tenant's request, any necessary verification of need and release form along with a cover letter explaining reasonable accommodations standards and process to the verification source identified by the applicant or resident.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



7. Management has the right to sufficient documentation to make a decision, but does not have a right to diagnosis, medical history or treatment unless necessary to implement a reasonable accommodation request, for example chemical sensitivity to certain materials.
8. **[Site manager, resident service coordinator, 504/ADA coordinator - select title]** will approve or disapprove a reasonable accommodation request as soon as possible, but within **[5, 10]** working days if there is no verification required or within **[5,10]** working days of receiving sufficient verification to make a decision.
9. NOTE: In some complex cases, a meeting with applicant/resident and any service providers or other technical assistance sources may be the best way to identify a reasonable solution. Ordinarily, the **[development or housing authority]** will provide the accommodation as requested to applicants or tenants who are eligible for accommodations to remove barriers. However, when the **[development or housing authority]** finds the proposed accommodation unreasonable because it poses an undue financial and administrative burden or a fundamental change in the nature of the program, the **[development or housing authority]** will discuss alternatives with the applicant/resident. Applicants or residents may bring anyone they consider helpful to such a meeting. Such meetings will be arranged as soon as possible at a mutually agreeable time for all participants. If the applicant/tenant has limited English proficiency, management will, when necessary in order to comply with Title VI of the Civil Rights Act of 1964, arrange and pay for a language interpreter.
10. If the applicant/resident meets the definition of person with a disability and when necessary documents the connection between her disability and the need for the accommodation, and management has determined the request is reasonable, the manager will implement the change as soon as possible, but no later than **[5, 10]** working days from the time of the decision or as soon as is reasonably possible for items requiring bids, construction, special

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



equipment, etc. Management will notify applicant/resident of reasons for delay and estimated completion time for such requests.

11. **OPTIONAL** If **[site manager, resident service coordinator, 504/ADA coordinator]** believes, based on evidence, that a request is structurally infeasible, poses an undue financial and administrative burden or requires a fundamental change in the nature of the program, they will consult **[504/ADA coordinator, higher company or housing authority official, legal department, whomever you choose]** before making a final decision.

12. If **[development, housing authority, final decision maker]** finds that the request poses an undue financial and administrative burden, they will notify applicant/resident and offer to make changes that do not pose such a burden. This could include paying for a less expensive partial accommodation, combining **[development, housing authority]** funds with resources the applicant/resident may find or waiting until a later time when more funds are available. Management will discuss alternative accommodations with the applicant/tenant before making a decision. Any agreement for a partially delayed or alternative accommodation will be in writing or in an alternate permanent format. Applicant/resident may request documentation of the basis for determining undue financial and administrative burden.

13. If **[development, housing authority, final decision maker]** finds that the request is not structurally feasible or requires a fundamental change in the nature of the program, management will give applicant/resident a written or alternate format explanation and will discuss and carry out any reasonable alternatives that do not require an undue financial and administrative burden or a fundamental change in the nature of the program.

14. **[IF DEVELOPMENT OR HOUSING AUTHORITY IS REQUIRED TO HAVE OR CHOOSES TO HAVE A GRIEVANCE PROCEDURE]** If a reasonable accommodation request is denied for any reason, **[site manager, resident service coordinator, 504/ADA coordinator]** will notify applicant and will include in the denial notification a written or alternate format notice of the right

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



to a grievance hearing and the procedures for requesting one. If an applicant/resident disagrees with a reasonable accommodation decision, they may request a grievance hearing by asking **[manager, resident, service coordinator, 504/ADA coordinator]** either verbally or in writing or some alternate format within **[5, 10]** working days of receiving the decision. Also we will translate this important document into other languages for applicants and residents who do not read English well or at all ,” because their primary language is not English (have “limited English Proficiency”), when Title VI of the Civil Rights Act of 1964 requires us to do so. When Title VI does not require us to do so, we will attach a notice in multiple languages informing applicants and residents that this is an important document and that we will provide free language assistance.

15. **[IF APPLICABLE as above]** Upon request, the **[site manager, resident service coordinator, 504/ADA coordinator]** will arrange a grievance hearing with an uninvolved **[company or housing authority]** official within **[5,10] days of the** request at a mutually agreed upon time. The applicant/resident may bring any other person(s) she thinks is necessary to present her case. If the applicant/tenant has does not speak or understand English well (has “limited English proficiency” because their primary language is not English, management will, when necessary in order to comply with Title VI of the Civil Rights Act of 1964, arrange for a language interpreter.

The rules of evidence will not apply, but all parties will have opportunity to present documentation of the request and reasons for denial. The grievance official will issue a final written or alternate format decision to all parties within **[5, 10]** days of the hearing.

16. If, with or without a grievance hearing, an applicant/resident agrees to something other than the request, applicant/resident will sign or otherwise record approval of such an agreement.

Name _____

Phone _____

Fax _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



E-mail _____

INCLUDE THE FAIR HOUSING LOGO/STATEMENT and Notice of 504 COORDINATOR)

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Appendix 2

SAMPLE: NOTICE OF RIGHT TO REASONABLE ACCOMMODATION

(Can be given to applicants/tenants and/or posted)

You may ask for a reasonable accommodation, if you have a disability which causes you to need . . .

- a change in the rules or policies or services or how we do things that would give you an equal chance to live here and use the facilities or take part in programs on site,
- a change in your apartment or a special type of apartment that would give you an equal chance to live here and use the facilities or take part in programs on site,
- a change to some other part of the housing site that would give you an equal chance for you to live here and use the facilities or take part in programs on site,
- a change in the way we communicate with you or give you information.

If we know that you have a disability or you can show that you have a disability and if your request is reasonable (***does not pose “an undue financial and administrative burden*,” and does not require a fundamental change in the nature of the program**), we will try to make the changes you request.

We will give you an answer in **[5, 10]** days unless there is a problem getting the information we need or unless you agree to a longer time. We will let you know if we need more information or verification from you or if we would like to talk to you about other ways to meet your needs.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



If we turn down your request, we will explain the reasons and you can give us more information if you think that will help.

If you need help filling out a REASONABLE ACCOMMODATION REQUEST FORM or if you want to give us your request in some other way, we will help you. You can get a reasonable accommodation request form at _____ or by calling _____ or Massachusetts Relay #711.

NOTE: All information you provide will be kept confidential and be used only to help you have an equal opportunity to enjoy your housing and the common areas.

*** In simple language this legal phrase means if it is not too expensive and too difficult to do.**

_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age familial status, veteran status, public assistance, genetic information, gender identity, disability, or any other class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



INCLUDE THE FAIR HOUSING LOGO/STATEMENT and Notice of 504 COORDINATOR)

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: REQUEST FOR A REASONABLE ACCOMMODATION

Name of Head of Household: _____

Phone: _____

Address: _____

1. The following member of my household has a disability as defined below:
(A physical or mental impairment that substantially limits one or more major life activities; a record of having such an impairment; or being regarded as having such an impairment.)

Name: _____

Relation to Head of Household _____

2. As a result of his/her/my disability I request the following change or changes so that the person listed can live here as easily or successfully as the other residents. Check the kind of change(s) you need.

- a. An apartment for people who have difficulty seeing well or who are blind.
- b. An apartment for people who have difficulty hearing well or who are deaf.
- c. An apartment designed to meet the physical needs of people who use wheelchairs or who have a mobility impairment and need the features of an accessible apartment..
- d. A regular apartment that has some things changed so I can use it.
Please describe what needs to be changed.

- e. A certain kind of parking space or a particular place where I need my space to be. Write what you need on the lines below.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



- f. An assistance animal (an animal that helps me by doing things I cannot do or that are very hard for me to do or an animal that gives me emotional support that makes the symptoms or results of my disability better.)

- g. A change in how we talk with you or give information to you. This could mean we get some sort of auxiliary aid(s) to help us talk and understand each other better or helps you have access to written information or when we talk with you. (Some examples are: signs you can feel so you know what they say, a doorbell that flashes, a reader or sign language interpreter, papers or documents in large print or Braille, recordings of information, or texting or e-mail or some other computer method that helps us talk to each other.) This does not include giving you individual things such as a hearing aid, computer or cell phone. Please write the particular ways you need something to help us give information to each other on the lines below:

- h. A change in a rule, services or way we do things or run the housing. Write what you need below.:

- i. Any other housing need you have because of a disability. Please write what you need on the lines below:



_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status, veteran status, public assistance, genetic information, gender identity, disability or any other class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

INCLUDE THE FAIR HOUSING LOGO/STATEMENT and Notice of 504 COORDINATOR)

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: CONSENT FOR THE RELEASE OF INFORMATION NECESSARY TO PROCESS A REASONABLE ACCOMMODATION

To Applicant or Tenant: You have to sign a release of information to allow us to verify your disability related need for the accommodation you requested. Please make sure the information about who is to give information and who is to receive the information is clearly filled in before you sign it.

I GIVE PERMISSION TO GIVE INFORMATION TO:

Name _____

Title _____

Housing Authority or Development Name _____

Address _____

Phone/TTY _____

I GIVE PERMISSION TO GIVE INFORMATION FROM:

Name _____

Title _____

Service or Medical Organization _____

Address _____

Phone/TTY _____

REGARDING:

Tenant or Applicant Name _____

Address _____

Phone/TTY _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



I hereby authorize the service or healthcare provider named above to contact the housing staff listed above or housing provider listed above to contact the service provider listed above to verify disability status, need for the requested accommodation described below and the connection between the two. I understand that this information will be kept confidential and used only to make a decision about my reasonable accommodation request. I understand I may change my mind and notify the housing and service provider that I no longer give permission to discuss my request.

Signed: _____

Date: _____

(Adult resident with disability or guardian)

Title 18, Section 1001 of the US Code states that a person is guilty of a felony for knowingly and willingly making false statements to any Department of the United States Government. HUD and any owner (and any employee of HUD or the owner) may be subject to penalties for unauthorized disclosures or improper uses of information collected based on consent forms. Use of the information collected on the basis of this verification is restricted to the purposes cited above. Any person who knowingly or willingly requests, obtains or discloses any information under false pretenses concerning an applicant or participant may be subject to a misdemeanor and fined not more than \$5000. An applicant or participant affected by negligent disclosure of information may bring civil action for damages and seek other relief, as may be appropriate, against the officer or employee of HUD or the owner responsible for the unauthorized disclosure or improper use. Penalty provisions for misusing the Social Security Act at 208 (a) (6), (7 and (8). Violations of these provisions are cited as violations of 42 U.S.C. 408 (a) (6), (7) and (8).

INCLUDE THE FAIR HOUSING LOGO/STATEMENT and Notice of 504 COORDINATOR)

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: LETTER TO A TENANT FOR A MEETING ABOUT A REASONABLE ACCOMMODATION

Dear _____,

We have received your request for a reasonable accommodation. It would help us make our decision if we could meet with you. You may bring someone to help you to the meeting.

We would like to meet on (date, time, place). If you cannot come at that time, please call us at _____ or use (TTY # or Mass Relay 711 to arrange another time.

At this meeting, we will talk about (describe issue simply and clearly including specific questions, if any). [See example below.]

Please come ready to talk about the changes you requested. Please bring copies of any information you think might help us understand what you need.

We look forward to meeting with you. Thank you.

EXAMPLE:

At the meeting we would like to discuss the assistive listening device you want us to put in the community room. We would like to learn more about the system you need and whether you have any information on the least expensive place to purchase it.

OR

We have determined that the cost is too high (will pose an undue financial and administrative burden) and we need to discuss with you if there are less expensive ways to meet your needs.

_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status,

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



veteran status, public assistance, genetic information, gender identity, disability or any other class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

INCLUDE THE FAIR HOUSING LOGO/STATEMENT and Notice of 504 COORDINATOR)

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: REQUEST TO TENANT FOR MORE INFORMATION OR VERIFICATION RE: A REASONABLE ACCOMMODATION REQUEST

Dear _____,

We have received your request for a reasonable accommodation. We need to know more about [issue, in clear and simple language] before we can decide.

We need to know more because [reason, in clear and simple language].

Some ways you could give us more information are [acceptable means of verification]. If these ways are a problem for you, there may be some other ways to provide the information we need. We will be happy to talk to you about other ideas you may have.

We will not make a decision until we have this new information.

If you think that you have already given us this information or if you think we should not ask for this kind of information, please call us at _____ or use (TTY # or Mass Relay 711). Please call if you have any other questions. Thank you.

Examples of issues and why a housing provider needs to know more.

- Issue: Please explain why you need a washer in your apartment when the laundry room is accessible.
Reason: We need to provide a washer in the apartment only if you are unable to use the laundry room because of your disability.
- Issue: Usually tenants just drop off rent checks without discussion. Explain why you need a sign language interpreter when you do this.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Reason: We will provide communication assistance if you show it is necessary because there is something important you have to communicate each time.

- Issue: You asked for an audio loop in the community room. Could you tell us where to buy them and the model number and cost of what you need, if you know it?

Reason: We need to know exactly what you need and we would like to find the least expensive equipment that will effectively meet your needs.

_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status, veteran status, public assistance, genetic information, gender identity, disability, or any other class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

INCLUDE THE FAIR HOUSING LOGO/STATEMENT and Notice of 504 COORDINATOR)

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: DENIAL OF REQUEST FOR REASONABLE ACCOMMODATION

Dear _____,

You requested the following change or reasonable accommodation: [describe request]. We have denied your request because:

- [] You do not meet the definition of a person with a handicap/disability so we are not required to provide a reasonable accommodation.
- [] You did not show that you need this accommodation because of your disability in order to enjoy or participate equally in our housing.
- [] We think the accommodation you requested is not reasonable because:
 - [] It will cost too much money and is more work than we can do without hiring more staff (an undue financial and administrative burden).
 - [] It will change the fundamental nature of our program.
 - [] It is impossible to make the physical changes you requested because of the way the building is built (in legal terms, structurally infeasible).
 - [] Based on the documentation you provided, we do not believe the accommodation you requested is likely to enable you to comply with the terms of your lease.

We decided this because [give reasons in clear, simple language].

We used these facts to deny your request [give facts in clear, simple language].

To make this decision we [list documents or records reviewed, people spoken with, and other aspects of investigative process].

Continued on the next page

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



If you disagree with this decision, you may request an informal meeting by [describe process].

Example: Why a request might be unreasonable.

We cannot walk your dog for you. Although your disability requires you to have a dog, you will have to care for the dog because caring for animals is not part of the housing program. (It would require a “fundamental change “ in the program.)

Or

You asked us to ban children from playing in the courtyard because the noise upsets you. We can’t do this because the playground equipment is in the courtyard. Children also have a right to equal access to the property, including a place to play.

Example: Description of facts.

You said you walked to work each day. This is a half-mile. It is only a block to the rental office. You told us walking to the office was too long, but since it is shorter than your walk to work, we think you can bring your rent check to the office.

Example: What information verification source provided.

You asked us to call your physical therapist (name) to verify that you are being treated for an injury that prevents you from walking to the office. However, she said you can walk one block now and that soon you would have no limitations. You then told us that you can walk to the office, but that it is a “bother.”

Example: Unlikely to be effective.

You asked us to let you have time to try a new medication which will keep you from disturbing your neighbors by banging on the wall. However, you did not keep your last agreement to take medication and you have not told us anything that has changed in that regard.

_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status,

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



veteran status, public assistance, genetic information, gender identity, disability, or any other class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____ Fax _____

Phone _____ E-mail _____



SAMPLE: REASONABLE ACCOMMODATION APPROVAL NOTICE

Dear _____ ,

We have approved your request for the following change or reasonable accommodation: [description].

[] We can provide this accommodation by _____ (date).

[] To make the change you requested, we must have bids and then arrange installation so we cannot make the change immediately. We will let you know the date as soon as we have that information.

[] Other reason for delay.

Please call us at _____ or (TTY) if you have any questions.

If you think this accommodation will not meet your needs or will take too long to provide, you may request an informal meeting by: _____.

_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status, veteran status, public assistance, genetic information, gender identity, disability or any other class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



**INCLUDE THE FAIR HOUSING LOGO/STATEMENT and Notice of 504
COORDINATOR)**

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: LETTER TO VERIFICATION SOURCE FOR A REASONABLE ACCOMMODATION REQUEST

Note: This sample assumes that neither the person's disability nor the need for the accommodation as a result of the person's disability is "obvious." If the person's disability is obvious you are only permitted to verify the nexus.

Dear _____,

Enclosed is a form signed by _____ asking you to verify that he or she meets the definition of person with a disability for purposes of reasonable accommodation and that his or her request is necessary in order to have equal access to the housing or programs.

State and federal laws require housing providers to make reasonable accommodations or changes to either the apartment, other parts of the housing complex, or to house rules, policies, services and procedures (not essential terms of the lease) if such changes are necessary to enable a person with a disability to have equal access to and enjoyment of the apartment and other facilities or programs at the site. Please note that such changes must be **necessary to remove some physical or administrative barrier** resulting from the person's disability. In other words, there must be a connection between the person's disability and the need for the accommodation.

The applicant or tenant in question has requested the accommodation described on the enclosed form. Please indicate on that form whether you believe the individual has a disability within the definition provided and whether the accommodation is necessary and will achieve its stated purpose. You may also add any other information that would be helpful in making the right accommodation for this person. If part of the applicant/tenant's reasonable accommodation plan includes services to be provided by your organization, please indicate whether your organization will provide those services.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



This form should not be used to discuss the person's diagnosis, the severity of the person's disability, or any other information that is not necessary to evaluate or provide the disability-related request for an accommodation. Also, please don't send any medical records.

Please note that the applicant/tenant has signed the form requesting you to answer the questions. You can call _____ at _____ or use (TTY #) or Mass Relay at 711 if you have any questions. Thank you. Please return the form to: _____.

_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status, veteran status, public assistance, genetic information, gender identity, disability, or any class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

INCLUDE THE FAIR HOUSING LOGO/STATEMENT and Notice of 504 COORDINATOR)



SAMPLE: CONSENT FOR THE RELEASE OF INFORMATION NECESSARY TO PROCESS A REASONABLE ACCOMMODATION

To Applicant or Tenant: You have to sign a release of information to allow us to verify your disability related need for the accommodation you requested. Please make sure the information about who is to give information and who is to receive the information is clearly filled in before you sign it.

I GIVE PERMISSION TO GIVE INFORMATION TO:

Name _____

Title _____

Housing Authority or Development Name _____

Address _____

Phone/TTY _____

I GIVE PERMISSION TO GIVE INFORMATION FROM:

Name _____

Title _____

Service or Medical Organization _____

Address _____

Phone/TTY _____

REGARDING:

Tenant or Applicant Name _____

Address _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Phone/TTY _____

I hereby authorize the service or healthcare provider named above and housing provider listed above to contact one another to verify disability status, need for the requested accommodation described below and the connection between the two. I understand that this information will be kept confidential and used only to make a decision about my reasonable accommodation request. I understand I may change my mind and notify the housing and service provider that I no longer give permission to discuss my request.

Signed: _____

Date: _____

(Adult resident with disability or guardian)

Title 18, Section 1001 of the US Code states that a person is guilty of a felony for knowingly and willingly making false statements to any Department of the United States Government. HUD and any owner (and any employee of HUD or the owner) may be subject to penalties for unauthorized disclosures or improper uses of information collected based on consent forms. Use of the information collected on the basis of this verification is restricted to the purposes cited above. Any person who knowingly or willingly requests, obtains or discloses any information under false pretenses concerning an applicant or participant may be subject to a misdemeanor and fined not more than \$5000. An applicant or participant affected by negligent disclosure of information may bring civil action for damages and seek other relief, as may be appropriate, against the officer or employee of HUD or the owner responsible for the unauthorized disclosure or improper use. Penalty provisions for misusing the Social Security Act at 208 (a) (6), (7 and (8). Violations of these provisions are cited as violations of 42 U.S.C. 408 (a) (6), (7) and (8).



SAMPLE: VERIFICATION OF NEED FOR A REASONABLE ACCOMMODATION

Dear (Health Care or Service Provider as listed in the consent for release above)

Name _____ has requested a reasonable accommodation (please see attached request) and requested that you fill out the following certification to establish the need for the disability related need for the accommodation (please see attached release of information).

PLEASE RETURN TO:

1. In my opinion, the Applicant or Tenant has a disability as defined below.
 - YES (Proceed to question #2)
 - NO (Proceed to the signature section)
 - I have insufficient knowledge regarding this person or situation (Proceed to the signature section)
 - A) A physical or mental impairment that substantially limits one or more major life activities.
 - B) A record of having such an impairment.
 - C) Being regarded as having such an impairment.

2. In my professional opinion,
 - the applicant/tenant, as a result of his/her disability, requires the changes to policies, services, procedures or physical change to the apartment or common area as described in the attached request in

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



order to remove barriers to equal housing access. Please initial the tenant/applicant's request (below or attached).

OR

[] the Applicant or Tenant as a result of his/her disability does not require the changes to the unit or common area or to policies, services, and procedures as described in the request (below or attached) in order to remove barriers to equal housing access.

OR

[] I am unable to verify that the requested accommodation is necessary for the above named person as a result of his/her disability to remove barriers to equal housing access.

If applicable, please indicate, if known, where any specialized equipment may be obtained: _____

Signature and Title _____

Date: _____

If you have any questions about filling out this form, please call: _____ or use (TTY # or Mass Relay #711. Thank you.



Title 18, Section 1001 of the U.S. Code states that a person is guilty of a felony for knowingly and willingly making false or fraudulent statements to any department of the United States Government. HUD and any owner (or any employee of HUD or the owner) may be subject to penalties for unauthorized disclosures or improper use of information collected based on the consent form. Use of the information collected based on this verification form is restricted to the purposes cited above. Any person who knowingly or willingly requests, obtains, or discloses any information under false pretenses concerning an applicant or participant may be subject to a misdemeanor and fined not more than \$5,000. Any applicant or participant affected by negligent disclosure of information may bring civil action for damages, and seek other relief, as may be appropriate, against the officer or employee of HUD or the owner responsible for the unauthorized disclosure or improper use. Penalty provisions for misusing the social security number are contained in the Social Security Act at 208 (a) (6), (7 and (8). Violations of these provisions are cited as violations of 42 U.S.C. 408 (a) (6), (7) and (8).

_____ does not discriminate on the basis of race, color, religion, national origin, ancestry, sexual orientation, age, familial status, genetic information, gender identity, or disability in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: REQUEST FOR CONSIDERATION OF MITIGATING CIRCUMSTANCES

To Applicant or Tenant: You have to sign a release of information to allow us to verify your disability related need for the accommodation you requested. Please make sure the information about who is to give information and who is to receive the information is clearly filled in before you sign it. You do not have to sign this consent to allow contact if you decide not to request an accommodation or if the information about who is to give information and who is to receive the information is not clearly filled in.

I GIVE PERMISSION TO GIVE INFORMATION TO:

Name _____

Title _____

Housing Authority or Development Name _____

Address _____

Phone/TTY _____

I GIVE PERMISSION TO GIVE INFORMATION FROM:

Name _____

Title _____

Service or Medical Organization _____

Address _____

Phone/TTY _____



REGARDING:

Tenant or Applicant Name _____

Address _____

Phone/TTY _____

I hereby authorize the service or healthcare provider named above to contact the housing staff listed above or housing provider listed above to contact the service provider listed above to verify disability status, need for the requested accommodation described below and the connection between the two. I understand that this information will be kept confidential and used only to make a decision about my reasonable accommodation request. I understand I may change my mind and notify the housing and service provider that I no longer give permission to discuss my request.

Signed: _____

Date: _____

(Adult resident with disability or guardian)

Title 18, Section 1001 of the US Code states that a person is guilty of a felony for knowingly and willingly making false statements to any Department of the United States Government. HUD and any owner (and any employee of HUD or the owner) may be subject to penalties for unauthorized disclosures or improper uses of information collected based on consent forms. Use of the information collected on the basis of this verification is restricted to the purposes cited above. Any person who knowingly or willingly requests, obtains or discloses any information under false pretenses concerning an applicant or participant may be subject to a misdemeanor and fined not more than \$5000. An applicant or participant affected by negligent disclosure of information may bring civil action for damages and seek other relief, as may be appropriate, against the officer or employee of HUD or the owner responsible for the unauthorized disclosure or improper use. Penalty provisions for misusing the Social Security Act at 208 (a) (6), (7 and (8). Violations of these provisions are cited as violations of 42 U.S.C. 408 (a) (6), (7) and (8).

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



I have a disability. I request that you consider the following reasons why the problems that caused you to reject my application or send me a lease violation or eviction notice are a result of my disability and why they are not likely to happen again. These are the mitigating circumstances.

1. I think the problem happened as a result of my disability. This is why my disability resulted in the problem. (Please describe below or on other side)

2. I think the problem is not likely to happen again because:

The things described below have changed in my life.
(Please describe below or on other side.)

OR

A housing provider giving me a reasonable accommodation is likely to solve the problem. (Please describe or attach a REASONABLE ACCOMMODATION REQUEST form.)

3. You can verify that the problem for which I would be rejected or evicted from housing was as a result of my disability by contacting the health care or service provider listed above.

4. You can verify the reasons that I think the problem isn't likely to happen again and that I will be likely to continue doing what I need to do to avoid these problems by contacting the medical or service provider listed above.

5. You can verify that the reasonable accommodation request I made is necessary for me because of my disability and likely to solve the problem by contacting the medical or service provider listed above.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status, veteran status, public assistance, genetic information, gender identity, disability or any class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: MITIGATING CIRCUMSTANCES VERIFICATION

Dear _____ ,

Enclosed is a form signed by _____ explaining that s/he:

should not be rejected from housing on the basis of tenancy problems in his/her previous living situation;

OR

should not be evicted from housing for tenancy problems

Usually a person with this kind of tenancy problem described in attachment is not accepted for housing or faces a possible eviction; however, state and federal law require that a person with a disability, if requested, be given an opportunity to show that: 1) the problem was a result of the disability, and either 2) something has happened since then that would make the problem unlikely to recur, or that as a result a reasonable accommodation (change in the apartment, building complex, rules or procedures - but not essential lease provisions), the former problem would be unlikely to recur.

Please fill out the enclosed form so that we can verify whether the problem described in attachment was a result of the applicant/tenant's disability and whether the applicant's/tenant's explanation as to why the problem is unlikely to recur is convincing.

Please call me at _____ or use (TTY # or Mass Relay 1-800-439-2370/711 if you have any questions.

PLEASE RETURN THE ATTACHED FORM TO: _____

Thank you.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



I verify the following:

1. **YES NO** (name of person)'s tenancy problem, as described on the attached form was as a result of his/her disability.

2. **YES NO** The problem is not likely to happen again because something has changed. (Please describe your reasoning. The person's diagnosis or specific treatment is not relevant, but the applicant's compliance with treatment and successful cessation of the behavior related to the tenancy problem is relevant.)

3. **YES NO** The problem described above is not likely to recur if the requested reasonable accommodation is provided. (Please describe your reasoning. The person's diagnosis or specific treatment is not relevant, but the applicant's compliance with treatment and successful cessation of the behavior related to the tenancy problem is relevant.)

4. **YES NO** If the requested accommodation plan described includes services from me or my organization; I certify that I or the organization has agreed to provide services.

Date: _____ Signature and Title: _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved

Title 18, Section 1001 of the U.S. Code states that a person is guilty of a felony for knowingly and willingly making false or fraudulent statements to any department of the United States Government. HUD and any owner (or any employee of HUD or the owner) may be subject to penalties for unauthorized disclosures or improper use of information collected based on the consent form. Use of the information collected based on this verification form is restricted to the purposes cited above. Any person who knowingly or willingly requests, obtains, or discloses any information under false pretenses concerning an applicant or participant may be subject to a misdemeanor and fined not more than \$5,000. Any applicant or participant affected by negligent disclosure of information may bring civil action for damages, and seek other relief, as may be appropriate, against the officer or employee of HUD or the owner responsible for the unauthorized disclosure or improper use. Penalty provisions for misusing the social security number are contained in the the Social Security Act at 208 (a) (6), (7 and (8). Violations of these provisions are cited as violations of 42 U.S.C. 408 (a) (6), (7) and (8).

_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status, veteran status, public assistance, genetic information, gender identity, disability or any class protected by state or local law, in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____



SAMPLE: ACCESSIBLE UNITS POLICY LANGUAGE

When an accessible unit becomes available, Management will select the next eligible current tenant in the development who requires and has requested a unit with the design features of the unit available.

In the event no tenant is available for transfer, Management will contact the next applicant on the waiting list who requires and has requested a unit with the design features of an accessible unit. In the case of an available accessible unit when no qualified applicant has applied, the development will list the unit on the Massachusetts Registry of Accessible Units before filling the accessible unit with someone who doesn't need its features. If, after listing the unit for at least 15 days as required by MGL 151B 7A (3), there is no applicant who needs the accessible features, then the unit will be offered to the next qualified applicant on the waiting list. This applicant will be required to complete a lease addendum form, in which they agree to transfer to a comparable non-accessible unit within the development should a tenant or applicant need an accessible unit. The lease addendum will specify who will pay for expenses associated with the move of the tenant should it become necessary.

If, after occupying the accessible unit, the tenant's physical condition changes and the tenant would now benefit from continued occupancy in the accessible unit, this addendum form would be waived and no longer be required. Failure to accept or move to the offered unit shall be deemed material non-compliance with the Occupancy Agreement and be cause for termination of the Agreement.

Note: You must include whose responsibility it is to pay for moving expenses.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: HUD REQUIRED NOTIFICATION OF NONDISCRIMINATION ON THE BASIS OF DISABILITY STATUS BASED ON EXHIBIT 2-3 OF THE 4350.3 REV-1, PAGE 2-51

Owners must provide the information specified in paragraph 2-29 in all written communications with the public. Exhibit 2-3 provides a sample notification. Owners may use the actual exhibit as guidance in providing this information or use a different notice, such as the one below.

Paragraph 1 applies to all federally assisted properties.

Paragraph 2 applies to owners, managing entities, or developments/housing authorities employing 15 or more people

1. [Development/housing authority]_____does not discriminate on the basis of disability status in the admission or access to, or treatment or employment in, its federally assisted programs and activities. [Note: Management may wish to list federal, state and local covered classes in addition.]
2. The person named below has been designated to coordinate compliance with the nondiscrimination requirements contained in the Department of Housing and Urban Development's regulations implementing Section 504 (24 CFR, part 8 dated June 2, 1988)

Name

Address

City

State

zip

()

Telephone-Voice

()

Telephone-TTY

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE LEASE ADDENDUM

(has received prior approval from MassHousing)

Resident acknowledges that the unit now occupied by Resident was specifically designed and adapted for occupancy for persons with physical disabilities needing accessible units. Resident further acknowledges that Resident does not at this time need an accessible unit, but does have the right if necessary in the future to establish that such a need exists. Resident further acknowledges that Management retains the right to allocate accessible units to those who have need for such units, as defined by federal and state regulations. Resident agrees that should another existing resident or applicant need an accessible unit, resident will upon thirty (30) days written notice from Management, move to a different dwelling unit of comparable size and rent. Failure to accept or move to the offered unit shall be deemed material non-compliance with this Occupancy Agreement and be cause for termination of the Agreement.

Costs of moving expenses will be paid for by [designate management or resident. Management may choose who will pay for what, but HUD requires properties with federal funds to provide such information in the addendum. Management may wish to list some costs, but not others which will be paid by management]

Resident _____

Management _____

Date _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



SAMPLE: HOUSING REFERENCE

TO: _____

RE: _____ (List all persons who will be on lease)

PLEASE RETURN TO: _____

TO REFERENCE SOURCE: I am applying for housing and authorize the release of the information requested below. I understand signing this release is voluntary and that the information is to be used only for purposes of housing and will be kept in a confidential file.

Signature of applicant(s): _____

Date: _____

1. Please check type of housing in which the above applicant lived.
 - Apartment
 - House
 - Rooming House
 - Other
2. For what period within the past 5 years did applicant live at this address?
From: _____ To: _____
3. While living in your facility, did the applicant, family or guests fail to abide by house rules and regulations? If yes, please explain.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



4. Did the applicant, family or guests interfere with the rights of other persons' comfort, safety, privacy, security or peaceful enjoyment within the last 5 years (threaten, assault, exhibit public sexual behavior, or behave in an unduly loud and disruptive manner, etc.)? If yes, please explain.

5. Did the applicant pay rent and meet other financial obligations in a timely manner? If not, please explain.

Is any money still owed?

6. Did the applicant, family or guests damage any property? If yes, please explain. Was any damage paid for?

7. Did applicant, family and guests take proper care of the unit and common space? If no, please explain.



8. To your knowledge, have the applicant, family members or guests engaged in any use, possession or distribution of illegal drugs or paraphernalia? If yes, please explain, including the source of your knowledge.

9. To your knowledge, have the applicant, family or guests engaged in any other housing-related illegal activities? If yes, please explain, including the source of your knowledge.

10. To your knowledge, have the applicant, family or guests ever engaged in careless smoking, cooking or other behavior which could endanger him/her or others? If yes, please explain.

11. To your knowledge, is there any reason to believe that applicant, family or guests would not abide by the conditions of tenancy in a multi-family housing development? If yes, please explain.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Title 18, Section 1001 of the U.S. Code states that a person is guilty of a felony for knowingly and willingly making false or fraudulent statements to any department of the United States Government. HUD and any owner (or any employee of HUD or the owner) may be subject to penalties for unauthorized disclosures or improper use of information collected based on the consent form. Use of the information collected based on this verification form is restricted to the purposes cited above. Any person who knowingly or willingly requests, obtains, or discloses any information under false pretenses concerning an applicant or participant may be subject to a misdemeanor and fined not more than \$5,000. Any applicant or participant affected by negligent disclosure of information may bring civil action for damages, and seek other relief, as may be appropriate, against the officer or employee of HUD or the owner responsible for the unauthorized disclosure or improper use. Penalty provisions for misusing the social security number are contained in the Social Security Act at 208 (a) (6), (7 and (8). Violations of these provisions are cited as violations of 42 U.S.C. 408 (a) (6), (7) and (8).

Date: _____

Signature and Title: _____

_____ does not discriminate on the basis of race, color, religion, sex, national origin, ancestry, sexual orientation, age, familial status, veteran status, public assistance, disability, genetic information, gender identity, or any other class protected by state or local law in the access to its programs for employment, or in its activities, functions or services. The following person(s) are responsible for coordinating compliance with applicable nondiscrimination requirements.

Name _____

Phone _____

Fax _____

E-mail _____

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Appendix 3

Reasonable Accommodation Requests: Determining Undue Financial and Administrative Burden and Fundamental Alterations to the Program

Note: There is no clear-cut test to determine what constitutes an undue burden or a fundamental change in your program, but the following provides a framework. **Consult your 504/ADA coordinator or your lawyer if you have any doubts.**

Note: all properties should be in compliance, as applicable, with Section 504, ADA Title II and III, the Architectural Barriers Act, the Fair Housing Amendments Act and state laws (Chapter 151B and the Massachusetts Architectural Access Board Code). Individual accommodations cover situations beyond general compliance.

Some Things to Keep In Mind

- In general, a change in a rule, policy or procedure is unlikely to cause an undue financial and administrative burden because most such changes are not cost related. Such changes may, however, pose a fundamental change in the housing program because the rules, policies and procedures are designed to carry out the purpose of the housing program or to comply with the general tenancy laws.
- A change to the physical structure of the unit, the common area, or method of communication does not generally fundamentally alter the nature of your program because the goal is to provide quality affordable housing to low and moderate income persons, regardless of disability. Such changes may, however, pose an undue financial and administrative burden.
- You need not make structural changes to the common areas if there is an equally effective administrative solution, provided your program as a whole is accessible in accordance with your property's Transition Plan.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Also you need not make structural changes to a unit if your property has the requisite number of accessible units and an administrative solution exists.

- When deciding what accommodation will meet an applicant or tenant's needs, you must provide the accommodation requested unless doing so would result in an undue financial and administrative burden or fundamental change in the program. NOTE: This is a change in HUD's interpretation which required that owners give "primary consideration" to the applicant/resident's preferred method of removing the barrier, but allowed any equally effective barrier removal. Many believe this new policy would not withstand a court challenge, particularly in affordable housing where there is a duty to control costs in order to control rents. However, according to some housing providers, HUD has penalized them for providing anything other than what the applicant/resident requested except in cases of undue financial and administrative burden.
- If providing an accommodation would result in an undue financial and administrative burden or fundamental change to the program, you are still required to take any action up to that point. You must also explore other options for meeting the applicant/tenant's needs. You should engage in an interactive dialogue with the requester to determine if an alternative accommodation will work. The person with the disability determines if any alternative will be effective. Often the ADA Hotline (1-800-949-4232), the Massachusetts Assistive Technology Partnership Center (1-800-848-8867) or local independent living centers can provide technical assistance on workable solutions.
- You might not be able to provide the same accommodation to a second person as you did to the first person. Each request for an accommodation must be considered on a case-by-case basis because each person's needs are different and the development's financial situation changes over time.
- Housing providers are not required to provide personal devices (i.e. eyeglasses, walkers, canes) but, sometimes personal equipment is a less

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



expensive way of removing a barrier than making a physical modification. For example, it may be equally effective, but less expensive to purchase an emergency call device to be worn around the person's neck than to install emergency cords in every room in the unit. Such personal devices would be owned by the housing provider and lent to residents who need emergency cords as a substitute for installing emergency cords.

Factors to Consider In Determining an Undue Financial and Administrative Burden On The Housing Program

To determine if a requested accommodation poses an undue financial and administrative burden, you must know the expected cost and your available financial and personnel resources at the time of the request. You must consider all the relevant factors when assessing undue financial and administrative burdens. Housing authorities and assisted housing providers have different factors that must be considered. The following is based on the HUD Occupancy Task Force Report's chapter on Undue Financial and Administrative Burden, but includes changes to housing finance since the report was written.

Public Housing Authorities (PHAs)

As of this writing, each PHA development has its own budget but the operating budget for each property is folded into a comprehensive document that covers the entire PHA. Subsidy is determined based on PHA-wide calculations and costs are allocated over many properties. The PHA's Action Plan (some are required to create and submit annual and five year plans and others only 5 year plans) must contain projected costs to cover alterations to units and facilities to address property-based compliance needs and individual reasonable accommodation requests. PHAs with more than 250 units are required to convert to asset management. Smaller PHAs may do so. The document, Preparing for Asset Management, Under the New Public Housing Operating Rule (24 CFR 990): A Planning Document, 2006, located at <http://www.hud.gov/offices/pih/programs/ph/am/docs/pham.pdf> provides useful information for understanding the transition.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Costs associated with individual requests for accommodations generally come out of the development budget unless the request involves major structural changes, such as widening doorways, a roll-in shower, or building a ramp. In such instances, the PHA's capital construction monies may be used if available. In that case, the PHA staff responsible for capital projects usually determines if the accommodation poses an undue financial and administrative burden following whatever consultation process the PHA has established. Most accommodation requests that do not involve major structural changes probably will not pose an undue financial and administrative burden to the development. However, even if a development is not able to afford a change, the PHA as a whole may be able to afford the change. If the site manager concludes that the site can't afford the change, he/she should contact the PHA's 504 Coordinator or follow whatever consultation process the PHA has established to determine whether other PHA resources are available. If the request is not a major structural change, the site manager must examine factors listed below.

Factors the PHA Site Manager Must Consider

The larger the cost, the more factors a PHA may need to consider.

- 1) The number of units
- 2) Total number of employees at the site
- 3) The site budget, including income, expenses and cash flow:

Note: every public housing site budget should have a line item for reasonable accommodation, but a manager must also look at the other line items as possible resources.

- 4) Reserves (you may need to contact your housing authority asset manager to determine the availability of these funds)
- 5) Other funds both within the PHA, such as the Comprehensive Grant Program (Capital Fund Program) and the PHA's Contingency Fund, and outside the PHA, such as government and private agencies.
- 6) Planned improvements or repairs essential to maintaining decent, safe, sanitary living conditions.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



- 7) The difference between the cost of the accommodation and the amount available from all sources after other demands are weighed (expenses in #3 and improvements/repairs in #6) shows what the property can afford up to the point of undue burden. The property may be able to afford some, but not all, of the costs. In this case, the site manager will have to see if funds from the PHA as a whole can supplement funds available from the site.

Other Important Considerations

- 1) Have you obtained any necessary bids from entities familiar with providing physical access for people with disabilities?
- 2) Can cost reductions be achieved without compromising the effectiveness of the accommodations?
- 3) Have you sought technical assistance?

Factors for Requests that Involve Major Construction at PHAs

- 1) Reserves: In the current fiscal year, will the PHA make a deposit to reserves, make a withdrawal to reserves or break even? If a surplus is projected, are there known demands against these funds? Will using reserves result in the PHA not being able to maintain at least 25% of the required level or seriously impact the PHA's efforts to increase reserve levels as required by HUD through Public Housing Management Assessment Program (PHMAP)?
- 2) Is a budget revision required and possible?
- 3) Will the request pose any serious negative impact on the PHA's financial stability in the current budget year?
- 4) Will the request require removing a load-bearing wall? (This is not required.)
- 5) Will the request cause a significant change to a critical element of the PHA's long-range plan, including any necessary physical changes identified in the property's 504/ADA Transition Plan (e.g. a proposed accommodation requires that lead-based paint removal be deferred, repair of damaged roofs be postponed, repair or replacement of life, health or safety systems be postponed). If so, can it be revised?

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



- 6) Will the request impair the ability of the PHA to complete planned improvements or repairs, including normal maintenance, that are essential to maintaining decent, safe, and sanitary living conditions?
- 7) Will there be a substantial increase in administrative workload? For example, in the current budget year does the accommodation prevent the PHA from:
 - a) performing essential management duties expressed in the lease (e.g. reexaminations or required unit inspections)?;
 - b) performing administrative or maintenance duties essential to the operation of the program (e.g. rent collection, routine or preventive maintenance)?
 - c) meeting the program operating requirements as expressed in the Annual Contributions Contract, other agreements, or performance indicators (i.e. the Public Housing Assessment System-PHAS); or responding to a court order?.
- 8) Will there be a negative impact on services provided by the PHA and mandated by the lease or other agreements? (Exclude services provided by third parties where such services are not under the direct control or funded by the PHA's operating budget).

Assisted Housing

Assisted housing uses property-based financial management. Resources from properties under common ownership may not be mixed. The ownership entity is unique to each property, as are the income and expenses. Each property has a separate regulatory agreement and subsidy contract which may be "layered" (have more than one type of subsidy).

Factors the Assisted Housing Property Manager Should Consider

- 1) The number of units;
- 2) Total number of employees at the site;
- 3) The site budget, including income, expenses and cash flow;

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



- 4) Replacement reserves; (You may need to contact your asset manager to determine the availability of these funds). HUD Handbook 4350.3 REV-1 states that HUD Field Offices will consider a request to use the residual receipts account to pay for structural alterations. The Handbook also indicates that burdens exist when residual receipts are insufficient to cover the cost of structural changes and replacement reserves cannot be replenished within one year. In those circumstances, the Handbook states that “Generally, an owner would not be required to make structural changes.” The key word here is “generally”: the handbook does not offer any absolutes with respect to declaring undue burdens. The Handbook implies that an undue burden is approached when a rent increase is required to make a structural change but doesn’t say that a rent increase is an undue burden. See 4350.3, paragraph 2-43, beginning page 2-39 and Exhibit 2-6: Examples of Undue Financial and Administrative Burden, pages 2-55 and 2-56. NOTE: If replacement reserves repeatedly do not have enough money to pay for accommodations, it may be necessary to consider a rent increase or some sort of refinancing as a way to generate sufficient reserves to meet reasonable accommodation requests and other property needs)
- 5) Other funds from government and private agency sources;
- 6) Whether the request will cause any serious negative impact on the property’s financial stability in the current budget year, including the ability to meet FHA, HUD, other government, or private lender requirements to operate in sound financial condition as expressed in regulatory, management, subsidy or financing agreements;
- 7) Whether the request will require removing a load-bearing wall; (This is not required.)
- 8) Whether the request will cause a significant change to a critical element of the development’s Capital Needs Plan, including any necessary physical changes identified in the property’s 504/ADA transition plan (e.g. a proposed accommodation requires that lead-based paint removal be deferred, repair of damaged roofs be postponed, repair or replacement of life, health or safety systems be postponed) and whether the plan can be revised;

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



- 9) Whether the ability of the development to complete planned improvements or repairs, including normal maintenance, that are essential to maintaining decent, safe, and sanitary living conditions will be impaired;
- 10) Whether there will be a substantial increase in administrative workload - for example, if, in the current budget year, the accommodation prevents the development from:
 - a) performing essential management duties expressed in the lease (e.g. reexaminations or required unit inspections);
 - b) performing administrative or maintenance duties essential to the operation of the program (e.g. rent collection, routine or preventive maintenance)
 - c) meeting the program operating requirements as expressed in the Annual Contributions Contract, other agreements, or HUD's performance indicators (such as the Real Estate Assessment Center-REAC, Management and Occupancy Review-MOR and Property Management Review-PMR); or responding to a court order.
- 11) Whether there will be a negative impact on services provided by the development and mandated by the lease or other agreements; (Exclude services provided by third parties where such services are not under the direct control or funded by the development's operating budget).

The difference between the cost of the accommodation and the amount available from all sources after other demands are weighed (expenses in #3 and improvements/repairs in #6) shows what the property can afford up to the point of undue burden. The property may be able to afford some, but not all, of the costs. In this case, the manager must discuss with the applicant or tenant the best use of the available money as described in "Next Steps" section below.

Note: Assisted housing providers and disability rights advocates disagree on whether providing an accommodation is an undue burden if it prevents the owner from receiving his/her distribution (a return on his/her investment). Many providers believe that this return should be calculated as a cost of doing business (a bill that must be paid) before money is available to be used for a modification.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Many advocates argue that owners should receive a distribution if there is surplus cash after meeting all the property's obligations including providing accommodations. HUD has not taken a position.

Other Important Considerations

- 1) Have you obtained any necessary bids from entities familiar with providing physical access for people with disabilities?
- 2) Can cost reductions be achieved without compromising the effectiveness of the accommodations?
- 3) Have you sought technical assistance?

Next Steps If Undue Financial and Administrative Burden is Established

If, after considering all the factors above, a PHA or assisted housing provider concludes that providing an accommodation will pose an undue financial and administrative burden, the entity must still explore the following:

- 1) When can the accommodation be programmed into modernization or other planned renovations?
- 2) What work can be done up to the point of undue financial and administrative burden? When can the rest of the work be done? Does it make sense to set aside the currently available money and add to it in the next budget cycle to fully fund the change?
- 3) Can the resident or some other outside party make up the difference between what the housing provider can afford and the full cost?
- 4) Are there methods that would improve access even if full access were not achieved?
- 5) What is the applicant/resident's preference among these alternatives?

Fundamental Alteration in the Nature of the Program for Both PHAs and Assisted Housing Providers

Determining whether a request poses a fundamental change in your housing program is not a cost based test. It requires you to identify the purpose of your housing program and how you achieve that purpose. PHAs and assisted

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



housing providers' purpose is to provide safe and sanitary housing for low and moderate income tenants who meet program eligibility requirements. The primary ways they achieve this purpose include applicant processing, lease enforcement, physical maintenance, some service provision, and administrative and financial procedures to ensure program stability and regulatory compliance. The tenant's essential lease provisions include maintaining a safe and sanitary unit, not interfering with other tenants' quiet enjoyment, not engaging in criminal activity, paying rent on time, and complying with other reasonable rules. Changes that would require fundamental changes in these or other essential elements of the program, such as lowering admission standards, waiving essential lease requirements or otherwise fundamentally changing the program would not be required. Likewise, most changes in the types of services the housing provides would be a fundamental change although changes in how the housing services are provided generally would not be a fundamental change.

For example, if a resident asks you to provide housekeeping services because she cannot clean or reach or open the trash chute because of her disability, you may refuse because providing housekeeping services would fundamentally change the type of services you provide. It would be reasonable to assist the resident in arranging housekeeping services. It is also necessary for you to figure out with the resident how she or someone can empty her trash because your trash removal system is a barrier for the resident. The resident must, however, comply with her lease with the accommodation.

What to Consider in Deciding if an Accommodation Requires a Fundamental Change in the Nature of the Program

In deciding whether an accommodation request would alter the fundamental nature of the program, you should consider whether the accommodation:

- requires the admission of an ineligible family or individual;
- lowers tenant selection standards;
- reduces the obligations of tenancy or the lease compliance standards, as expressed in the lease and in landlord/tenant law;

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



- requires significant services that are not part of your housing program; or
- requires any other significant change in the standard way your type of housing is provided.

Please see the 4350.3 REV-1, page 2-54, Exhibit 2-5: Examples of Fundamental Alterations for a discussion of actions that would result in a fundamental alteration in the nature of a public or assisted housing program.

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Appendix 4

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved

Letter from HUD to MassHousing Regarding Notice of Right to Reasonable Accommodation



U. S. Department of Housing and Urban Development
Washington, D.C. 20410-2000

OFFICE OF THE ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

APR 28 1995

Ms. Ann Anderson
Community Services Officer
Massachusetts Housing Finance
Agency
50 Milk Street
Boston, MA 02109

Dear Ms. Anderson:

Thank you for your letter of February 6, 1995, regarding responsibilities of housing providers to provide notice to program beneficiaries regarding their right to reasonable accommodations under Section 504 of the Rehabilitation Act of 1973.

In your letter, you asked for clarification concerning HUD's position on whether or when a housing provider must or should give notice of a right to a reasonable accommodation. You also stated that your agency wishes to ensure that residents have sufficient notice of their right to a reasonable accommodation to prevent unnecessary evictions; at the same time, your agency is reluctant to impose specific notice requirements without guidance from HUD.

As you know, Section 504 requires nondiscrimination on the basis of disability in any program or activity receiving financial assistance from this Department. The Department's Section 504 regulations at 24 CFR Part 8 do not specifically state that recipients must provide notice of a right to reasonable accommodation; however, the regulations do set forth a number of requirements that, once applied to the day to day policies, procedures and practices involved in carrying out federally-assisted housing programs, the Department interprets as requiring such notice.

For example, § 8.54, "Notice" requires recipients that employ 15 or more persons to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees that it does not discriminate on the basis of disability pursuant to Section 504. The regulations state that the notice shall state that the recipient does not discriminate in admission or access to, treatment or employment in, its federally-assisted programs and activities. It would be a logical extension of this notice to inform program beneficiaries of their right to request reasonable accommodations

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Appendix • 277

they may need in order to receive and benefit from all aspects of the recipient's housing. This would include areas such as application process, assignment to dwelling units meeting their needs, and the eviction process.

Section 8.24 of the regulations covers existing housing programs and requires that such programs, when viewed in their entirety, are readily accessible to and usable by persons with disabilities. The program regulations for the various types of housing the Department funds through its federally-assisted programs set out various requirements that recipients notify program beneficiaries about rules, policies, practices and procedures that govern the housing program. Applying the Section 504 program accessibility concept to these rules would lead to an expectation that housing providers notify persons with disabilities of their right to request a reasonable accommodation, as may be needed based on their disability, in order to fully participate in the housing program.

Finally, § 8.33 of the regulations requires a recipient to modify its housing policies and practices to ensure that these policies and practices do not discriminate on the basis of disability, against qualified persons with disabilities. Modification of routine policies and practices followed in all aspects of the provision of housing certainly includes notification of rights to reasonable accommodation, actively carrying out policies and practices in a manner which reasonably accommodates the needs of persons with all types of disabilities, and notifying beneficiaries of other rights afforded to them under Section 504.

Other applicable provisions of the Section 504 regulations are § 8.4, general nondiscrimination requirements, particularly 8.4(b)(1)(iii) and (iv); § 8.6, communications; § 8.51, self-evaluation; and § 8.21, non-housing facilities.

Aside from the Section 504 regulatory requirements, it is my understanding that the Department is currently in the process of developing a proposed rule which will propose regulatory changes to the Department's occupancy regulations to incorporate various recommendations of the Public and Assisted Housing Occupancy Task Force established by the Secretary. I believe that the types of notices you are concerned about are among the changes being proposed. As soon as these regulations are published as a proposed rule, I will notify you so you may have an opportunity to comment on the rules.



I hope the above information is helpful. If you have any additional questions, please contact Cheryl Kent, Director, Disability Rights Division at (202) 708-2618, extension 278 (voice) or (202) 708-1734 (TTY).

Sincerely,



Bonnie M. Milstein
Director
Program Compliance and
Disability Rights



Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Appendix 5

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



Letter from HUD Regional Office of Fair Housing Regarding Opening Waiting Lists



U.S. Department of Housing and Urban Development

O'Neill Federal Building
10 Causeway Street
Boston, Massachusetts 02222-1092

New England

March 2, 1998

TO: PHAs administering Section 8 Programs

SUBJECT: Management of Section 8 Waiting Lists

HUD's Office of Fair Housing and Equal Opportunity and Office of Public Housing for New England are issuing this guidance to assist PHAs which administer Section 8 Existing programs. Most of the matters addressed here concern those PHAs which open their Section 8 waiting list only periodically (rather than keeping the list open continuously). A few of the items pertain to all PHAs administering a Section 8 program.

The decision to open a Section 8 waiting list only periodically is fully within the authority of PHAs. However, periodic openings can be confusing for PHA clients and, in certain circumstances, can have effects which are illegally discriminatory. One objective of this guidance is to assure that PHAs are fully aware of the particular obligations that come with administering such periodic openings, as well as particular options that are available in processing applications received during a periodic opening.

Notice of Waiting List Openings

When a PHA opens a waiting list, it must give notice by publication in a local newspaper of general circulation and by distribution through minority media. [24 CFR 982.206] HUD regulations under Section 504 also require that PHAs use forms of outreach which will reach persons with disabilities. [24 C.F.R. 8.28 (a)(1)] In order to ensure suitable outreach to a broad range of applicants, including people of color, families with children, and persons with disabilities, the housing authority should include among its targets, minority organizations, disability organizations and Independent Living Centers. PHAs should also consider issuing notifications of waiting list openings to local welfare offices, homeless shelters, domestic violence shelters, the Red Cross, CAP agencies, as well as Departments of Mental Health and Mental Retardation. For persons with sensory disabilities, housing authorities should consider using different outreach methods such as radio advertisements and closed caption advertisements on cable television.

Any public notice announcing the application procedure should be simple, direct and clear. It should contain sufficient detail to inform potential participants when the waiting list will be open

Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved



and what an interested person must do to get on the waiting list. The notice must include a statement informing potential applicants of the PHA's obligation to make reasonable accommodations in its policies and procedures for persons with disabilities.

HUD regulations prescribe that a PHA must use the following to select among applicants on the waiting list with the same preference (see 24 CFR 982.207):

1. Date and time of application, or
2. A drawing or other random-choice technique.

If the PHA uses the date of application as a factor in ranking applicants, any notice publicizing the opening of the waiting list should state this and explain what the critical action is that determines the date of application (i.e., whether applications are recorded by the date and time the application is picked up by the applicant, by the date and time a completed application is submitted to the PHA, or by some other action). If the "opening" will occur in one stage, the notice should specify the documentation necessary for an application to be accepted for placement on the waiting list.

Any use of chronology in the course of re-opening a waiting list includes a risk that some persons with disabilities will not have equal access to the certificates or vouchers. Any PHA using chronology to order applications must, therefore, be prepared to make necessary modifications in its process to mitigate this adverse effect. For example, a PHA may need to mail applications to people with disabilities well in advance of a "first-come, first-served" opening or provide some other means for assuring that a person's place on the waiting list is not adversely affected because of a disability. If a PHA requires applicants to obtain applications in person, it must make reasonable modifications of this requirement for applicants who cannot obtain applications in person because of a disability. The notice itself should clearly state this fact and should also state that the PHA will allow sufficient time for persons to make such requests for accommodation by phone or mail.

Use of a lottery or other random-choice technique precludes the necessity for special procedures to mitigate the adverse impact which may result from chronological processing. We recommend that you seriously consider random-choice methods for this reason. While it is within a PHA's authority to utilize chronological processing rather than random ordering when re-opening a waiting list, a PHA is fully responsible for assuring that such a method does not have an adverse impact on persons with disabilities. Maintaining such an assurance may require the use of administrative steps which are costly and time consuming for PHA staff. However, the Department will *not* view these costs as an "undus burden" under Section 504.

Applications

Recently, several housing authorities have distributed Section 8 applications which include questions not pertinent to Section 8 eligibility. Such inquiries may constitute invasions of privacy protected by federal and state privacy laws. Some PHAs are using the same application for the Low-Rent program and for the Section 8 certificate/voucher programs and thus inquiring about "tenant suitability", which is generally prohibited in evaluating Section 8 eligibility. [24 CFR



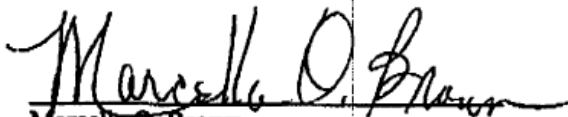
982.202] For example, some applications require applicants to answer questions about: any and all arrests or convictions, although only crimes involving drugs and violence are grounds for rejection of an application under Section 8; the identities and addresses of absent parents or ex-spouses; the names and addresses of persons the housing authority can contact as "general references."

Some PHAs report that requiring all documentation at initial application is inefficient and point out that some such information will be invalid by the time an applicant reaches the top of the list. Thus, a simple "pre-application" requiring minimal documentation may prove both more efficient and more expedient since it could be used for both a Low-Rent and Section 8 program. Complete documentation can be postponed until an applicant approaches the top of the list. In any event, PHAs should limit their requests for documentation from Section 8 applicants to what is required to verify program and preference eligibility under Section 8.

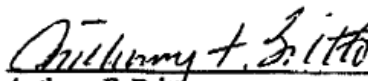
Conclusion

We encourage PHAs to seriously consider using random-choice methods as an alternative to chronological processing of a periodically opened waiting list. We believe that the former methods compare favorably in terms of administrative burden once a PHAs fair housing responsibilities are factored into the decision.

We welcome comments on these matters and hope to provide a forum for discussion of these and related matters in the upcoming months.



Marcella O. Brown
Director
Office of Fair Housing & Equal Opportunity
New England



Anthony F. Britto
Director
Office of Public & Indian Housing
New England



Copyright © 2015, MassHousing & Piltch Associates. All Rights Reserved





Massachusetts Housing Finance Agency
One Beacon Street, Boston, MA 02108

TEL: 617.854.1000 | FAX: 617.854.1028
TDD: 617.854.1025 | www.masshousing.com